Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1997

CASSANDRA JENKINS, a minor, by her mother
SANDRA HALL, and
ONEIKA McKENZIE, a minor, by her mother
ELIZABETH McKENZIE, *Petitioners*

v.

SUSANNAH HERRING and MELBA SIRMON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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140 pp

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QUESTIONS PRESENTED

1. Whether teachers violated clearly established Fourth Amendment rights of eight-year-old schoolgirls by twice strip searching the schoolgirls to look for seven dollars that another student reported missing from her purse.

2. Whether, as this Court held in *United States v. Lanier*, 117 S. Ct. 1219 (1977), the scope of a constitutional right can be clearly established by judicial decisions involving factually distinguishable contexts that put government officials on notice that their conduct is constitututionally impermissible, rather than only by rulings involving "concrete, factually similar" circumstances.

3. Whether a federal district court, in deciding whether to grant qualified immunity to persons asserted to have acted unconstitutionally, must determine whether the right alleged to have been violated was "clearly established" by examining only decisions of this Court, the Court of Appeals for the federal judicial Circuit of which it is a part, and the highest court of the State in which the events occurred -- and must ignore the weight of authority in other federal Courts of Appeals, district courts, and state courts.

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, the following were parties to the proceedings in the courts below: Talladega City Board of Education; Susannah Herring, in her official capacity as a teacher at Graham Elementary School; Melba Sirmon, in her official capacity as a counselor at Graham Elementary School; James E. Braswell, in his official capacity as a member of the Board of the Talladega City School District; Crawford Nelson, in his official capacity as principal at Graham Elementary School; Michael A. O'Brien, in his official capacity as a member of the Board of the Talladega City School District; and Charles Kurley, in his official capacity as Superintendent of the Talladega City School District.

TABLE OF CONTENTS

Page

Questions Presented i

Parties to the Proceeding ii

Table of Authorities iv

Opinions Below 1

Jurisdiction 1

Constitutional Provision Involved 1

Statement of the Case 2

REASONS FOR GRANTING THE WRIT 9

THE COURT OF APPEALS' STANDARD FOR ESTABLISHING THAT AN ASSERTED CONSTITUTIONAL RIGHT IS "CLEARLY ESTABLISHED" UNDER *HARLOW* v. *FITZGERALD* CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS 11

THE COURT OF APPEALS' HOLDING THAT STUDENTS LACK A CLEARLY ESTABLISHED FOURTH AMENDMENT RIGHT NOT TO BE STRIP SEARCHED IN A QUEST TO FIND ANOTHER STUDENT'S MISSING SEVEN DOLLARS CONFLICTS WITH DECISIONS OF THIS COURT AND THE OTHER COURTS OF APPEALS 20

Conclusion 30

TABLE OF CITED AUTHORITIES

Cases: Page(s)

Allen v. Sakai, ... *17*
40 F.3d 1001 (9th Cir. 1994), *cert. denied,*
514 U.S. 1065 (1995)
Anderson v. Creighton, ... *5, 12*
483 U.S. 635 (1987)
Anderson v. Liberty Lobby, Inc., ... *2*
477 U.S. 242 (1986)
Bakalis v. Golembeski, ... *16*
35 F.3d 325 (7th Cir. 1994)
Bellnier v. Lund, ... *23, 24, 26*
438 F. Supp. 47 (N.D.N.Y. 1977)
Bieregu v. Reno, ... *17*
59 F.3d 1445 (3d Cir. 1995)
Bilbrey v. Brown, ... *23, 27*
738 F.2d 1462 (9th Cir. 1984)
Boddie v. City of Columbus, ... *18*
989 F.2d 745 (5th Cir. 1993)
Bonitz v. Fair, ... *17*
804 F.2d 164 (1st Cir. 1986), *overruled in part on other grounds,*
Unwin v. Campbell, 863 F.2d 124 (1st Cir. 1988)
Burnham v. Ianni, ... *16*
No. 95-1962, 1997 WL 380691
(8th Cir. 1997) (*en banc*)
Cales v. Howell Pub. Sch., ... *26*
635 F. Supp. 454 (E.D. Mich. 1985)
Capoeman v. Reed, ... *16, 17*
754 F.2d 1512 (9th Cir. 1985)
Celotex Corp. v. Catrett, ... *2*
477 U.S. 317 (1986)
Cleveland-Perdue v. Brutsche, ... *16*
881 F.2d 427 (7th Cir. 1989)

Cornfield v. Consolidated High Sch. Dist. No. 230, ... *26, 28*
991 F.2d 1316 (7th Cir. 1993)
Courson v. McMillian, ... *15*
939 F.2d 1479 (11th Cir. 1991)
Dickerson v. McClellan, ... *17*
101 F.3d 1151 (6th Cir. 1997)
Doe v. Renfrow, ... *passim*
631 F.2d 91 (7th Cir. 1980) (per curiam), *cert. denied,*
451 U.S. 1022 (1981)
Figueroa v. United States, ... *17*
7 F.3d 1405 (9th Cir. 1993)
Hamilton v. Cannon, ... *15*
80 F.3d 1525 (11th Cir. 1996)
Harlow v. Fitzgerald, ... *11, 15, 16*
457 U.S. 800 (1982)
Hayes v. Long, ... *16*
72 F.3d 70 (8th Cir. 1995)
Hughes v. City of North Olmstead, ... *17*
93 F.3d 238 (6th Cir. 1996)
Ingraham v. Wright, ... *14*
430 U.S. 651 (1977)
Jenkins v. Talladega City Bd. of Educ., ... *4*
95 F.3d 1036 (11th Cir.1996), *rev'd en banc,*
115 F.3d 821 (11th Cir. 1997)
Jermosen v. Smith, ... *18*
945 F.2d 547 (2d Cir. 1991), *cert. denied,*
503 U.S. 962 (1992)
Johnson v. Jones, ... *2*
515 U.S. 304 (1955)
Lassiter v. Alabama A & M Univ., ... *passim*
28 F.3d 1146 (11th Cir. 1994) (*en banc*)
Los Angeles v. Lyons, ... *19*
461 U.S. 95 (1983)
M.J. v. State, ... *24*
399 So.2d 996 (Fla App. 1981)

Mitchell v. Forsyth, ... 15
472 U.S. 511 (1985)
New Jersey v. T.L.O., ... passim
469 U.S. 325 (1985)
Norfleet v. Arkansas Dep't of Human Servs., ... 16
989 F.2d 289 (8th Cir. 1993)
Oliver v. McClung, ... 26
919 F. Supp. 1206 (N.D. Ind. 1995)
People v. D., ... 23, 24, 25
34 N.Y.2d 483, 358 N.Y.S.2d 403,
315 N.E.2d 466 (1974)
Procunier v. Navarette, ... 15
434 U.S. 555 (1978)
Rochin v. California, ... 14
342 U.S. 165 (1952)
Rone by Payne v. Daviess County Bd. of Educ., ... 26
655 S.W.2d 28 (Ky. 1983)
Screws v. United States, ... 13
325 U.S. 91 (1945)
State ex rel. Galford v. Mark Anthony B., ... 26, 29
433 S.E.2d 41 (W. Va. 1993)
State v. Young, ... 26
216 S.E.2d 586 (Ga. 1975)
Tartar v. Raybuck, ... 23, 26
742 F.2d 977 (6th Cir. 1984), *cert. denied*,
470 U.S. 1051 (1985)
Terry v. Ohio, ... 21
392 U.S. 1 (1968)
United States v. Lanier, ... passim
117 S. Ct. 1219 (1997)
Ward v. County of San Diego, ... 17
791 F.2d 1329 (9th Cir. 1986)
Widener v. Frye, ... 26
809 F. Supp. 35 (S.D. Ohio 1992), *aff'd*,
12 F.3d 215 (6th Cir. 1993)

Williams v. Ellington, ... *26, 29*
936 F.2d 881 (6th Cir. 1991)
Williams v. Greifinger, ... *18*
97 F.3d 699 (2d Cir. 1996)
Wood v. Ostrander, ... *17*
879 F.2d 583 (9th Cir. 1988)
Woodward v. City of Worland, ... *17*
977 F.2d 1392 (10th Cir. 1992)
Ying Jing Gan v. City of New York, ... *18*
996 F.2d 522 (2d Cir. 1993)

Constitutional Provisions

U. S. Const. Amend. IV 1

Miscellaneous Authorities

WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 10.11 (3d ed. 1995) 25
LAWRENCE F. ROSSOW, SEARCH AND SEIZURE IN THE PUBLIC SCHOOLS 37 (2d. ed. 1995) 25
59 THE CLEARING HOUSE 252 (1986) 25
62 THE CLEARING HOUSE 165 (1988) 25
14 J. L. & EDUC. 421 (1985) 25
74 PHI DELTA KAPPAN 498 (1993) 25

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Cassandra Jenkins and Oneika McKenzie, by their mothers, pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals sitting *en banc* (App. 1a-38a) is reported at 115 F.3d 821. The panel opinion (App. 39a-83a) was reported at 95 F.3d 1036.

JURISDICTION

The judgment of a panel of the court of appeals was entered on September 23, 1996. The court of appeals voted *sua sponte* to rehear the case *en banc* and vacated the panel opinion. Judgment of the *en banc* court was entered on June 2, 1997. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1). Jurisdiction was vested in the district court under 28 U.S.C. §§ 1331, 1343, and the court's pendent and ancillary jurisdiction.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

1. This case concerns the strip searches of two eight-year-old students, petitioners Cassandra Jenkins and Oneika McKenzie, by a teacher and a school counselor in a public school in Talladega, Alabama. App. 3a.[1] On the afternoon of May 1, 1992, one of petitioners' classmates in the second grade at Graham Elementary School ("Graham") reported to her teacher that seven dollars was missing from her purse. Another classmate told the teacher that Cassandra had taken the money and put it in Oneika's backpack. Other students said that Cassandra and Oneika and another classmate, Anthony Jemison, had taken the seven dollars. The teacher looked in the backpack but found no money. She then questioned Cassandra, Oneika and Anthony in the hallway outside the classroom. App. 3a

At that point, the school music teacher, respondent Susannah Herring, approached the group in the hallway and took charge of the situation. She did not find out why the classroom teacher had singled out these three students, nor where else they had looked for the money; all she knew was one student's accusation that Cassandra had put the money in Oneika's backpack, that the money had not been found there, and that Cassandra, Oneika and Anthony were pointing the finger at one another. App. 62a. Herring immediately ordered the children to remove their shoes and socks. The children did as ordered, but no money was found. App. 40a. Respondent Melba Sirmon, a guidance counselor whose office was nearby, heard the questioning and heard Herring

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[1]Because petitioners' claims were dismissed on summary judgment, the facts must be viewed in the light most favorable to petitioners, the non-moving party in the district court. *See Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322 (1986); *see also Johnson* v. *Jones*, 515 U.S. 304, 314, 319 (1995).

talking about the possibility of requiring the children to remove their clothing to find the money. Pet'r C.A. App. 430, 436-37. She also heard Herring trying "to scare [the young girls] into confessing." *Id.* at 439. She joined Herring in the hallway, and the two respondents took Cassandra and Oneika to the girls' restroom. Inside the restroom, Herring told them to remove their clothes. According to Cassandra, Herring ordered them to go into the toilet stalls and to come back out with their underpants down to their ankles, which they did. The missing money was not found on the girls' person or in their clothing. App. 42a. Anthony was not subjected to a body search. Respondents took Cassandra, Oneika and Anthony to the principal's office. The principal asked the students where the money was. Anthony said that it was hidden behind a file cabinet, but when the teachers looked they did not find it there. Anthony also suggested the money was stashed in a locker, but the principal concluded that Anthony did not know where the money was and dismissed him. *Id.* at 41a.

Respondents then took petitioners back to the restroom and strip searched them a second time. Herring ordered them to remove their dresses, which they did. Cassandra was still wearing a slip, which Herring shook. Oneika was wearing only her underpants. A parent of another student was walking by in the hallway and heard the girls crying and an adult saying either "remove your slip" or "hold up your slip." App. 42a. She stepped into the restroom and saw the two girls, one in her panties and the other in her slip. When no money was found, respondents permitted the girls to get dressed. *Id.*

Following an investigation into the strip searches, the Talladega City Board of Education ("Board") concluded that the procedure Graham school officials used to investigate the alleged theft "was overwhelming and threatening to the students due to the age of the students." Pet'r C.A. App. 533.

The Board also concluded that Herring had committed a "gross error in judgment" regarding the manner in which she had investigated the theft, and that Sirmon had erred in her judgment in assisting Herring. The superintendent recommended that Herring be fired, but the Board declined to impose any serious sanctions. App. 43a.[2] There was uncontroverted evidence by a psychologist who examined the girls that as a result of the strip search, both girls suffered post-traumatic stress syndrome and other psychological problems. Pet'r C.A. App. 291-96.

2. Petitioners sued for damages under 42 § U.S.C. 1983, alleging violation of their clearly established Fourth Amendment rights.[3] The district court held that the facts, taken in the light most favorable to petitioners at the summary judgment stage, demonstrated a Fourth Amendment violation, that respondents never contended otherwise, and, indeed, that it would be "virtually impossible" for them to argue otherwise. *Jenkins v. Talladega City Bd. of Educ.*, No. 95-6243 (N.D. Ala., Jan. 19, 1995), Record Excerpts filed with Pet'r C.A. Brief, R5-87 at 22 & n.20. The district court

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[2]Among the disputed facts is whether a strip search occurred. Although the Board found that the search was overwhelming and threatening, it purported to find that no strip search occurred. That finding, however, is not binding on federal courts. For the purposes of summary judgment, the facts must be construed in the light most favorable to the petitioners. Thus, the Court must credit the testimony of the girls that they were strip searched and the testimony of a visiting parent that she saw the girls undressed in the restroom. No one denies that the girls were taken to the restroom.

[3]Petitioners also sought declaratory and injunctive relief under Section 1983; raised tort claims under Alabama law; and raised claims of race and sex discrimination under Title VI, 42 U.S.C. §§ 2000 *et seq.*, and Title IX, 20 U.S.C. §§ 1681, *et seq.* The Court of Appeals upheld the district court's rulings dismissing those claims, App. 43a-44a, and petitioners do not seek review of those claims in this Court.

initially denied respondents' motion for summary judgment based on qualified immunity. Citing *New Jersey* v. *T.L.O.*, 469 U. S. 325 (1985), and *Doe* v. *Renfrow*. 631 F.2d 91 (7th Cir. 1980), the district court held that the law was "clearly established." R2-27 at 5. On September 15, 1994, the district court *sua sponte* reconsidered and reversed its decision denying respondents qualified immunity, concluding that it had relied too heavily on a footnote in *T.L.O.*, and on the Seventh Circuit's decision in *Doe* v. *Renfrow*. R2-39 at 2.

3. A panel of the court of appeals reversed, holding that "Fourth Amendment law was sufficiently clear in 1992 that there could be no doubt that Herring's and Sirmon's actions . . . were unconstitutional," and that in searching the students, "Herring and Sirmon acted in blatant disregard of the Fourth Amendment." App. 45a, 70a. The court noted that, under *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987), "in light of pre-existing law, the unlawfulness must be apparent," but that "the very action in question [need not have] previously been held unlawful." App. 47a. The court concluded that qualified immunity may be defeated (1) in cases in which "the official misconduct is more egregious than conduct of the same general type that has been deemed illegal in other cases," and (2) in "cases in which application of the legal standard would necessarily lead reasonable officials in the defendant's situation to but one inevitable conclusion." *Id.* at 49a-50a.

The court held that the search did not bear a reasonable relationship to its objectives, as required by *T.L.O.* App. 61a-62a. Based on the facts viewed in the light most favorable to petitioners, the Court noted that "the possibility of finding the cash in the two restroom searches was slight (at best)." *Id.* at 61a. When respondents took over the situation, they did not know, nor did they seek to find out, specifics about the accusations and where else the money had been

sought. Thus, even before taking into account the nature of the infraction and the students' age, the panel found it "difficult to believe that any reasonable school official could surmise that it was constitutionally permissible to conduct these two highly intrusive searches where there was such a negligible possibility that any evidence of the infraction would be found." *Id.* at 63a.

The court then examined the nature of the infraction, observing that it is "obvious that an infraction that presents an imminent threat of serious harm -- for example, possession of weapons or other dangerous contraband -- would be the most serious infraction in the school context . . . . Thefts of small sums of money or less valuable items and possession of minor, nondangerous contraband would fall toward the opposite extreme of the spectrum. Such infractions would seldom, and probably never, justify the most intrusive searches." App. 65a, 67a-68a. The court reasoned that, "[e]ven if the *T.L.O.* reasonableness standard is indeterminate for a broad category of school searches, it indisputably prohibits strip searches of students in this situation." *Id.* at 68a.

Judge Birch dissented. Although he was "outraged by the conduct of the schoolteachers in this case and [was] convinced they left their better judgment at home on May 1, 1992," he would have held that "there was no binding, clearly established law that these schoolteachers violated in conducting the challenged strip searches." App. 73a.

4. The court of appeals decided *sua sponte* to rehear the case *en banc*, and reversed the panel decision. App. 1a-38a. The *en banc* court held that "at the time these events took place, the law pertaining to the application of the Fourth Amendment to the search of students at school had not been developed in a concrete, factually similar context to the extent that educators were on notice that [respondents']

conduct was constitutionally impermissible." *Id.* at 21a. The *en banc* court of appeals held that, for the law to be "clearly established, pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law *in the circumstances*." *Id.* at 13a (quoting *Lassiter* v. *Alabama A & M Univ.*, 28 F.3d 1146, 1149, 1150 (11th Cir. 1994) (*en banc*)).[4]

The *en banc* court of appeals did not view this Court's decision in *T.L.O.* as clearly establishing any relevant Fourth Amendment rights, because "[s]pecific application of the factors established" in *T.L.O.* was "notably absent from the Court's discussion and conclusion" in that case. App. 9a. There was, moreover, "no illustration, indication or hint [in *T.L.O.*] as to *how* the enumerated factors might come into play when other concrete circumstances are faced by school personnel." *Id.* at 9a-10a. Thus, school officials "were left to interpret, balance, and evaluate" the "broadly-worded phrases" of *T.L.O.* *Id.* at 14a, 16a.[5]

Regarding precedent from other courts, the *en banc* court held that "the law can be 'clearly established' for

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[4]The *en banc* court of appeals noted that this Court's recent opinion in *United States* v. *Lanier*, 117 S. Ct. 1219 (1997), unanimously holding that civil rights liability requires only "fair warning" of constitutional rights, and that neither Supreme Court precedent nor factually similar precedent is required to provide such warning, did not alter its understanding of the legal framework with respect to qualified immunity. App. 11a-13a.

[5]The court noted that *United States* v. *Lanier*, 117 S. Ct. at 1222, held that a right can be clearly established even in the absence of precedents applying the right to a similar factual situation, but distinguished *Lanier* on the ground that "we do not think this is an 'easy' case, nor do we view *T.L.O.* as applicable to the instant facts 'with obvious clarity.'" App.10a, 14a n.3.

qualified immunity purposes only by decisions of the U.S. Supreme Court, the Eleventh Circuit Court of Appeals, or the highest court of the state where the case arose." App. 14a n.4. Because "neither the Supreme Court nor any court in this Circuit nor the Alabama courts, on or before May 1, 1992, had ever actually applied the test established in *T.L.O.* to define a reasonable (or unreasonable) search in the context of facts materially similar to those of this school search," the *en banc* court granted respondents qualified immunity. *Id.* at 14a. The court did not view *Lanier*'s approval of consultation of the law of "other courts," 117 S. Ct. at 1227, as inconsistent with its own holding that only authority binding in the Eleventh Circuit is relevant, because the question in *Lanier* was whether Supreme Court precedent is the exclusive source of relevant guidance. *Id.* at 15a, n.4.

Judge Kravitch, joined by Chief Judge Hatchett and Judge Barkett, dissented. App. 21a. They believed that "*T.L.O.* sufficiently forewarns teachers that strip searching eight-year-olds in pursuit of a few dollars violates the Fourth Amendment." *Id.* at 22a. The dissenters would have held that "the nature of the [suspected] infraction here -- a small theft -- is insufficient as a matter of law to permit a strip search. . . . Strip searching a student is permissible only in extraordinary cases, and only to prevent imminent harm." *Id.* at 37a. They took issue with the majority's qualified immunity analysis, stating that "it is not enough simply to label preexisting law 'general,' or to identify factual distinctions in relevant precedent. Instead, a court must determine whether the generality of a rule casts doubt on its application to the present case or whether factual distinctions from prior precedent are 'material,' that is, they make the legal rule inapplicable in the later case or suggest that the present conduct is permissible." *Id.* at 24a.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari because the *en banc* court of appeals' decision raises questions of exceptional importance regarding the correct analysis of qualified immunity and the scope of the Fourth Amendment's protections for students attending public schools. The decision below conflicts with the decisions of this Court in *United States v. Lanier*, 117 S. Ct. 1219 (1997) and *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), and with decisions of the courts of appeals for the First, Third, Sixth, Seventh, Eight, Ninth, and Tenth Circuits.

The *en banc* court of appeals granted respondents qualified immunity on the ground that students lack any clearly established Fourth Amendment rights not to be strip searched based on a classmate's report of missing a small amount of pocket money. The court of appeals found existing Fourth Amendment precedent on student searches insufficiently clear and authoritative to defeat respondents' qualified immunity. It held that *T.L.O.*'s application of the Fourth Amendment to the school context provided no material guidance, because, in the *en banc* court of appeals' view, a right cannot be clearly established unless a prior decision has recognized the right in "a concrete, factually similar context." App. 21a. That holding conflicts with this Court's recognition in *Lanier* that a right can be clear even when it has been established in general terms and in a factually distinguishable context. 117 S. Ct. at 1227. The *en banc* court also declined to consider cases from other jurisdictions applying *T.L.O.* in settings more closely analogous to this case, on the ground that cases not binding in the Circuit cannot shed light on the specific contours of a right this Court has established in general terms. That holding conflicts with the law of at least seven other Circuits that have held that non-binding precedent is relevant to the decision whether the law is clearly established.

Moreover, every court that has considered whether school personnel may constitutionally strip search students suspected of stealing money or other property has held that they cannot; the only circumstances under which any court ever has upheld a strip search of students by school personnel is when the search was conducted to prevent imminent danger, such as that posed by possession of weapons or illegal drugs in schools.

The *en banc* court of appeals' decision sends a misleading message to school officials nationwide: that this Court's decision in *New Jersey* v. *T.L.O.* should be read to place no enforceable limits on the use by school personnel of highly intrusive search techniques in response to even the most minor suspected infractions. Correcting that misinterpretation of T.L.O. is essential in light of the fact that the use of strip searches in schools has persisted.[6] This Court's further guidance is urgently needed on the appropriate analysis of qualified immunity, and on the extent to which the Constitution sets constraints on strip searches.

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[6]See, *e.g.*, (by state) *Strip Search Sets Off Review*, THE DENVER POST, Mar. 10, 1996 at C2 (settlement of lawsuit after strip search of student in Colorado for missing $6); THE PATRIOT LEDGER (Quincy, MA), Apr. 23, 1997, at 16 (second and third graders in Massachusetts strip searched by teacher looking for missing $10); Curt Brown, *Former Student wins $16,000 in Suit*, STAR TRIBUNE (Minneapolis, MN), Sept. 6, 1996, at 3B (strip searching students in Minnesota without resorting to other alternatives, such as pat-down, prompted settlement); NEW YORK TIMES, May 21, 1996, at B1 (teacher in New Jersey strip searched third graders looking for missing $10); *$75,000 Settlement in Searches*, THE WASHINGTON POST, Mar. 27, 1997 (girls in Virginia school strip searched by teacher after missing $92 not located in their lockers); Tyrone Beason, *Seattle Schools Warned: No Strip Searches of Kids — State Law, 2 Successful Suits Make Officials Wary*, THE SEATTLE TIMES, Oct. 5, 1995, at B4 (teacher in state of Washington strip searched 13 year old boy looking for $5).

I. THE COURT OF APPEALS' STANDARD FOR ESTABLISHING THAT AN ASSERTED CONSTITUTIONAL RIGHT IS "CLEARLY ESTABLISHED" UNDER *HARLOW* v. *FITZGERALD* CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS

Qualified immunity shields public officials from personal damages liability under 42 U.S.C. § 1983 where the officials have violated no "clearly established rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). Under the standard this Court announced in *T.L.O.*, students have a "clearly established" right not to be strip searched based on the tenuous degree of suspicion and for the kind of minor infraction involved in this case. *See infra* Point II. The *en banc* court of appeals held, however, that petitioners lacked any such clearly established Fourth Amendment right and, therefore, granted respondents qualified immunity.

The *en banc* court of appeals' holding that the unconstitutionality of respondents' conduct was not sufficiently "clearly established," and that they therefore are protected by qualified immunity, seriously misconstrues this Court's qualified immunity decisions and conflicts with decisions of at least seven other Circuits. The *en banc* court set out two conditions that must be present for the law to be "clearly established" within the meaning of *Harlow*: *first*, decided cases must establish the right in concrete, factually defined circumstances that are materially similar to the case at hand, and, *second*, those cases must be binding precedents -- *i.e.* decisions of the Supreme Court, the federal court of appeals, or the highest court of the state where the conduct occurred. App. 5a 14a n.4. Neither of those holdings can be squared with the decisions of this Court and of other courts of appeals.

A. The Court of Appeals' Holding Requiring Factually Specific, Analogous Precedents Conflicts With This Court's Decision In *United States* v. *Lanier*

The *en banc* court of appeals relied on an overly expansive interpretation of qualified immunity to find that petitioners' rights under the Fourth Amendment were not sufficiently well established to protect them from an intrusive strip search by teachers looking for seven dollars. The *en banc* court held that "[f]or the law to be clearly established to the point that qualified immunity does not apply, the law must have been earlier developed in such a concrete and factually defined context to make it obvious" that defendant's precise conduct was unlawful. App. 5a (quoting *Lassiter*, 28 F.3d at 1149). In the court's view, "[f]or qualified immunity to be surrendered, pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every government agent that what defendant is doing violates federal law in the circumstances." *Id.* 5a (quoting *Lassiter*, 28 F.3d at 1150).

The *en banc* court of appeals' qualified immunity standard requires a level of factual specificity in the articulation of a constitutional right that this Court has rejected. In *Anderson v. Creighton*, 483 U.S. 635 (1987), this Court addressed the question of how particularly defined a right must be in order to be "clearly established" under *Harlow*. There, the Court said "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of pre-existing law the unlawfulness must be apparent." *Id.* at 640 (citations omitted). In *United States* v. *Lanier*, 117 S. Ct. 1219 (1997), decided just last Term, the Court expressly held that a right that has been defined in general terms, and applied only in

factually distinguishable circumstances, can clearly establish the law.[7]

This Court in *Lanier* reversed the Sixth Circuit, which had applied a standard essentially identical to that embraced by the *en banc* court of appeals in this case. Under *Lanier*, a right may be clear even in the absence of "precedents that applied the right at issue to a factual situation that is 'fundamentally similar'" to the claim at issue, and there may be "notable factual distinctions between the precedents relied on and the cases then before the court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights." *Id.* at 1227. As this Court explained, general statements of the law are not "incapable of giving fair and clear warning," and "a general constitutional rule already defined in the decisional law may apply with obvious clarity to the specific conduct in question." *Id.* The *en banc* court of appeals' requirement in this case that petitioners point to precedent construing their Fourth Amendment rights in a "concrete and factually defined context" that "dictate[s]" and "truly compel[s]," App. 5a, a finding of unconstitutionality in the circumstances of the case squarely conflicts with *Lanier*.

Attempting to defend its qualified immunity standard as not "contrary to the spirit" of *Lanier*, App. 13a, the Eleventh Circuit observed that, "although general principles of law *can* provide fair warning, they do not *necessarily*

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[7] *Lanier* arose in the context of a criminal prosecution under 18 U.S.C. § 242, which establishes criminal liability for willful violations of constitutional rights. In order to fulfill the due process requirement of fair warning of potential criminal liability, *Screws* v. *United States*, 325 U.S. 91 (1945) (plurality opinion), had required that the right at issue have been "made specific" by "decisions interpreting" the constitutional right. In further defining the level of specificity required, *Lanier* expressly equated the Section 242 standard with the "clearly established law" standard under *Harlow*. *Lanier*, 117 S. Ct. at 1227-1228.

provide such warning unless the constitutional rule at issue may be applied 'with obvious clarity.'" The Court further observed that in its view, *T.L.O.* does not apply to the facts of this case "with obvious clarity." *Id.* (emphasis added). Those observations do not diminish the need for review here for two reasons. First, as noted above, the Eleventh Circuit's own stated standard -- requiring close factual similarity of precedents in every case -- is contrary not only to the "spirit" but to the letter of *Lanier*. Second, the *en banc* court was simply wrong that *T.L.O.* fails to provide sufficient guidance here. *See infra* Point II.A. The clarity of the application of *T.L.O.*, involving a search of a student in a public school setting, to the facts of this case is far sharper than the application of the relevant precedents in *Lanier*. At issue in *Lanier* was whether the substantive due process right to "bodily integrity," identified in *Ingraham* v. *Wright*, 430 U.S. 651 (1977) (involving corporal punishment in schools), and in *Rochin* v. *California*, 342 U.S. 165 (1952) (involving pumping the stomach of a convicted prisoner), sufficiently clearly established the rights of state court employees and litigants to be free from sexual assault at the hands of a state court judge. Certiorari should be granted to resolve the conflict on this issue between the *en banc* court of appeals' decision and *Lanier*.

B. The Court of Appeals' Holding That Only This Court's, Its Own, And The Highest State Court's Decisions Are Relevant In Deciding Whether The Law Is Clearly Established Conflicts With Decisions of Seven Other Circuits

The *en banc* court of appeals held that *T.L.O.* was the only precedent relevant to its assessment of whether the law was clearly established, because in the Eleventh Circuit, "the law can be 'clearly established' for qualified immunity purposes only by decisions of the U.S. Supreme Court, Eleventh Circuit Court of Appeals, or the highest court of the

state where the case arose." App. 14a n.3 (citing *Hamilton* v. *Cannon*, 80 F.3d 1525, 1532 n.7 (11th Cir. 1996); *Courson* v. *McMillian*, 939 F.2d 1479, 1497-1498 & n.32 (11th Cir. 1991)). The court thus completely ignored decisions from other jurisdictions that *have* addressed school strip searches and uniformly have held that the Fourth Amendment prohibits strip searching students in the kind of circumstances presented in this case. *See infra* Point II.B.[8]

The *en banc* court's holding is in tension with this Court's own approach to assessing the clarity of the law. *Lanier* held that "decisions of the Courts of Appeals and other courts" are relevant to determining whether the law is clearly established. 117 S. Ct. at 1226-27. Notably, *Lanier* refers to the courts of appeals and other courts in the plural, thus indicating that the decisions of more than one Circuit or other court can be relevant in a particular case to the question of whether the law was clear enough to overcome qualified immunity. This Court also has suggested that even district court cases from other jurisdictions should be consulted. When the challenged wiretap decision in *Mitchell* v. *Forsyth*, 472 U.S. 511, 533-534 (1985), was issued, the closest cases were from district courts; this Court analyzed the state of the law by reference to those decisions. *See also Harlow*, 457 U.S. at 818 n.32 ("we need not define here the circumstances under which 'the state of the law' should be 'evaluated by reference to the opinions of this Court, of the Courts of Appeals, or of the local District Court.'") (quoting *Procunier* v. *Navarette*, 434 U.S. 555, 565 (1978)).

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[8]The *en banc* court overstates petitioners' position with respect to whether *T.L.O.* was the only case that could have clearly established the law. App. 6a n.1. Before the *en banc* court directed petitioners to brief very specific and narrow questions, petitioners argued that, "In addition to *T.L.O.* . . . and *Doe* . . . , there was relevant Ninth Circuit Law." Pet'r C.A. Brief at 20 n.6.

There is a square conflict in the Circuits over what constitutes the universe of cases relevant to the determination whether the law is "clearly established" within the meaning of *Harlow*. In the First, Third, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits, non-binding precedent is relevant. The Second and Fifth Circuits, however, appear to agree with the Eleventh Circuit that only binding precedent should be consulted. In the Seventh Circuit, "the rulings in other Circuits are instructive on what the law is as to constitutionally protected rights." *Bakalis v. Golembeski*, 35 F.3d 318, 325, n.7 (7th Cir. 1994). As the Seventh Circuit explained in *Cleveland-Perdue v. Brutsche*, 881 F.2d 427 (7th Cir. 1989), looking to "all relevant case law . . . makes eminent sense for it precludes an official from escaping liability for unlawful conduct due to the fortuity that a court in that particular jurisdiction had not yet had the opportunity to address the issue." *Id.* at 431.

The Eighth Circuit, in a recent *en banc* decision, endorsed consideration of all available decisional law, not just binding cases. "In order to determine whether a right is clearly established, it is not necessary that the Supreme Court has directly addressed the issue, nor does the precise action or omission in question need to have been held unlawful. In the absence of binding precedent, a court should look to all available decisional law including decisions of state courts, other Circuits and district courts." *Burnham* v. *Ianni*, No. 95-1962, 1997 WL 380691, at *1 (8th Cir. 1997) (*en banc*) (quoting *Hayes v. Long*, 72 F.3d 70, 73-74 (8th Cir. 1995); *Norfleet* v. *Arkansas Dep't of Human Servs.*, 989 F.2d 289, 291 (8th Cir. 1993)).

The decision below also squarely conflicts with the Ninth Circuit's standard. The Ninth Circuit has held that, "in the absence of binding precedent, a court should look to whatever decisional law is available to ascertain whether the law is clearly established under the *Harlow* test." *Capoeman*

v. *Reed*, 754 F.2d 1512, 1514 (9th Cir. 1985) . "The available decisional law includes cases from the state courts, other Circuits, and district courts." *Wood* v. *Ostrander*, 879 F.2d 583, 591 (9th Cir. 1988) (citing *Ward* v. *County of San Diego*, 791 F.2d 1329, 1332 (9th Cir. 1986), *cert. denied*, 483 U.S. 1020 (1987)); *accord Figueroa* v. *United States*, 7 F.3d 1405, 1408 (9th Cir. 1993). "Where there are few cases on point, and none is binding, 'an additional factor that may be considered in ascertaining whether the law is "clearly established" is a determination of the likelihood that the Supreme Court or this Circuit, would have reached the same result' as the non-binding authorities at that time." *Wood*, 879 F.2d at 593 (quotation omitted). *See also Allen v. Sakai*, 40 F.3d 1001, 1005 n.7 (9th Cir. 1994).

In the First, Third, Sixth and Tenth Circuits, non-binding precedent similarly is relevant. The Sixth Circuit "look[s] first to the decisions of the Supreme Court, then to the decisions of this and other courts within this Circuit, and finally to the decisions of other Circuits." *Hughes* v. *City of North Olmstead*, 93 F.3d 238, 241 (6th Cir. 1996). *See also Dickerson* v. *McClellan*, 101 F.3d 1151, 1158 (6th Cir. 1996). The Tenth Circuit also holds that "[o]rdinarily, in order for the law to be clearly established, there must be a Supreme Court or a Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found as plaintiff maintains." *Woodward* v. *City of Worland*, 977 F.2d 1392, 1397 (10th Cir. 1992). In "the absence of a previous decision from [its own] court," the Third Circuit similarly has held that decisions of other Circuits sufficed to "clearly establish" a constitutional right. *Bieregu* v. *Reno*, 59 F.3d 1445, 1459 (3d Cir. 1995). Finally, in *Bonitz v. Fair*, 804 F.2d 164 (1st Cir. 1986), *overruled in part on other grounds, Unwin v. Campbell*, 863 F.2d 124, 132 (1st Cir. 1988), the First Circuit held that the court should consider the decisions of the "Supreme Court, the

courts of appeals, and the local district court" to determine if the law is clearly established. *Id.* at 173.

Other Circuits, however, appear substantially to agree with the Eleventh Circuit, holding that only their own Circuit precedent and this Court's cases bear on the assessment of the clarity of the law for *Harlow* purposes. The Second Circuit, for example, has held that the "germane law in determining whether a right is clearly established for purposes of qualified immunity is 'the decisional law of the Supreme Court and the applicable Circuit court.'" *Williams* v. *Greifinger*, 97 F.3d 699, 706 (1996) (quoting *Ying Jing Gan* v. *City of New York*, 996 F.2d 522, 532 (2d Cir. 1993); *Jermosen* v. *Smith*, 945 F.2d 547, 550 (2d Cir. 1991), *cert. denied*, 503 U.S. 962 (1992)). The Fifth Circuit likewise examines only "the decisions of the Supreme Court and [the Fifth Circuit's] own decisions" to determine if the law has been clearly established in that Circuit. *Boddie v. City of Columbus,* 989 F.2d 745, 748 (5th Cir. 1993).

In sum, there is a sharp and genuine Circuit conflict on this issue. In our view, the unconstitutionality of respondents' conduct was clearly established by this Court's binding decision in *T.L.O.*, and probably was clear even before that decision. But even if that were not the case, the decided school search cases from other jurisdictions as of May 1992, taken together, certainly made petitioners' rights clear. There was already a consistent body of law condemning strip searches upon suspicion of a minor, non-dangerous offense. *See infra* Point II.A. Thus, under the standard of virtually any other Circuit but the Eleventh, Second, and Fifth, respondents in this case would not have been entitled to qualified immunity. In view of the broad Circuit conflict on this issue, issuance of a writ of certiorari is warranted.

C. Clarification Of The Appropriate Qualified Immunity Standards Is Of Substantial Importance to The Enforceability of Constitutional Rights

The *en banc* court of appeals' qualified immunity standards vitiate any enforceable Fourth Amendment limits on highly intrusive school searches seeking evidence of minor infractions or rules, as well as enforceable limits of other constitutional rights. Under that court's expansive interpretation of qualified immunity, officials in the Eleventh Circuit will continue in future cases to enjoy immunity from liability for highly intrusive searches such as the one in this case, or other egregious violations of constitutional rights. If the law governing petitioners' claims is not already clearly established by *T.L.O.*, then it is difficult to see how it will become clearer and better established. As this case illustrates, if the *en banc* Court of Appeals' decision stands, victims of unconstitutional searches will generally lack standing under *Los Angeles* v. *Lyons*, 461 U.S. 95 (1983), to obtain injunctive or declaratory relief. Courts of appeals thus need not, and virtually always will not, reach the underlying question of whether public officials' conduct was unconstitutional. Thus, the next time students are subjected to similar invasions of their personal privacy, there will again be no law sufficiently clearly established to permit them to obtain judicial enforcement of their Fourth Amendment rights. That result is perverse, because it places students like petitioners, accused of relatively minor misdeeds, in a worse position vis-a-vis enforcement of their Fourth Amendment rights than students engaged in serious criminal wrongdoing. That is because qualified immunity doctrine has no bearing on motions for suppression of evidence in criminal cases, so that the Fourth Amendment principles regarding school searches for illegal drugs, weapons or other evidence of potentially serious crime presumably will be further refined when evidence of crime is found, students are prosecuted,

and, as was the case in *T.L.O.* itself, they seek to suppress evidence as unconstitutionally obtained. Under the court of appeals' standard, if *T.L.O.* is too factually dissimilar to this case to have clearly established the law, then future elaborations of the standard in the context of criminal prosecutions likely would be as well.

II. THE COURT OF APPEALS' HOLDING THAT STUDENTS LACK A CLEARLY ESTABLISHED FOURTH AMENDMENT RIGHT NOT TO BE STRIP SEARCHED IN A QUEST TO FIND ANOTHER STUDENT'S MISSING SEVEN DOLLARS CONFLICTS WITH DECISIONS OF THIS COURT AND THE OTHER COURTS OF APPEALS

The *en banc* court of appeals held that precipitous and repeated strip searches of eight-year old schoolgirls in an effort to find seven dollars that a classmate reported missing did not violate any clearly established Fourth Amendment right. App. 20a-21a. In reaching its holding, the court observed, "In the absence of detailed guidance, no reasonable school official could glean from the broadly-worded phrases [in *T.L.O.*] . . . what constitutes an infraction great enough to warrant a constitutionally reasonable search, or conversely, minor enough such that a search of property or person would be characterized as unreasonable." App. 14a. That holding cannot be squared with this Court's decision in *New Jersey* v. *T.L.O.*, 469 U.S. 325 (1985). Moreover, it is contrary to every other reported decision involving strip searches in schools, and specifically conflicts with decisions of the Seventh and Sixth Circuits, and of the Supreme Court of West Virginia.

A. The Decision Below Conflicts With *New Jersey* v. *T.L.O.*

T.L.O. makes it obvious that strip searching petitioners under the circumstances presented by this case

was unconstitutional. *T.L.O.* held that the Fourth Amendment applies to searches of students by school personnel, but that "the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject." 469 U.S. at 333, 340. Accordingly, this Court held that school officials are not required to obtain a warrant before searching students under their authority, but that a school search must be reasonable under the circumstances. *Id.* at 340-41. Specifically, the Court required a two-part inquiry: First, a school search must be "justified at its inception," and, second, it must be "reasonably related in scope to the circumstances which justified the interference in the first place." *Id.* at 341 (quoting *Terry* v. *Ohio*, 392 U.S. 1, 20 (1968)). The Court explained:

> Under ordinary circumstances, a search of a student by a teacher or other school official will be 'justified at its inception' when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.

T.L.O., 469 U.S. at 341-342.

Applying that standard to its review of a decision to suppress evidence of marijuana dealing, this Court upheld the search of a high school student's purse based on reasonable suspicion that she was carrying cigarettes and had been smoking in violation of school rules, and upheld a subsequent, more intrusive search of the compartments of the purse and its contents after expressly finding that the initial look into the purse revealed "rolling papers," which raised

reasonable suspicion that the student was carrying marijuana. *Id.* at 347-48.

The repeated strip searches in this case clearly violated the Fourth Amendment under *T.L.O.*; indeed, although respondents dispute the facts, they have never argued that the challenged conduct (as established for purposes of summary judgment) was constitutional. The facts of *T.L.O.* were different from the facts here, but *T.L.O.* nonetheless clearly established the law applicable to this case. Strip searches are indisputably the most intrusive searches that school officials might plausibly be called upon to perform, yet the information that respondents relied upon in deciding to search Cassandra and Oneika falls well short of reasonable suspicion that they had hidden the missing seven dollars under their clothes. All that respondents knew about the missing money when they assumed control of the investigation was that one student had told the teacher that money was missing, that petitioners had been accused of taking the money, and that each of the suspected students denied having taken the money and said that the others did it. App. 62a. That limited information plainly failed to provide a basis for a single strip search of either girl; it is simply not conceivable that it could have justified the second strip searches. *See id.*

When the nature of the infraction is also taken into account in assessing the scope of those searches, as *T.L.O.* requires, their unconstitutionality is even more obvious. Theft of money from a fellow student is both unlawful and wrong, and responsible teachers will seek to ensure that students' money and possessions are safe in school. *T.L.O.*, however, places clear and enforceable limits on the extent to which students may be searched in an effort to enforce the law and the rules of the school. *See T.L.O.*, 469 U.S. at 342 (stating that the Court's standard "should ensure that the interests of students will be invaded no more than is

necessary to achieve the legitimate end of preserving the order in the schools"). The decision expressly requires that any school search be "reasonably related to the objectives of the search and not excessively intrusive in light of . . . the nature of the infraction." *Id.* at 342. If *T.L.O.* protects any Fourth Amendment rights at all, it prohibits strip searches in a quest for such nonthreatening items as contraband chewing gum, or allegedly stolen hair ribbons, favorite pencils, trading cards, or pocket money, especially when there is no basis to believe that such items have been secreted under a student's clothing.

T.L.O. sends a clear message condemning strip searches of students in circumstances like those at issue here. Several *pre-T.L.O.* decisions had condemned strip searches in schools, and this Court cited those cases with approval in *T.L.O.* as employing the same standard it was adopting. *T.L.O.*, 469 U.S. at 341 n.6 (endorsing standard in cases cited at 332 n.2 including, *inter alia*, *Tartar* v. *Raybuck*, 742 F.2d 977 (6th Cir. 1984); *Bilbrey* v. *Brown*, 738 F.2d 1462 (9th Cir. 1984); *Bellnier* v. *Lund*, 438 F. Supp. 47 (N.D.N.Y. 1977); *People* v. *D.*, 34 N.Y.2d 483, 358 N.Y.S.2d 403, 315 N.E.2d 466 (1974)).[9] Justice Stevens, joined by Justices

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[9]In *Bilbrey* v. *Brown*, the Ninth Circuit held that a teacher who strip searched fifth grade students looking for drugs, based on the teacher's observation of the students "exchanging something on the playground," was not entitled to qualified immunity because the law in the area of school searches was established enough to put the official on notice that the conduct would violate the students' clearly established Fourth Amendment rights. 738 F.2d at 1466. In *Tartar* v. *Raybuck*, although the Court of Appeals for the Sixth Circuit upheld school officials' search of a male high school student based on overwhelming evidence the student was concealing drugs, the court emphasized that school searches must be reasonable in scope, and expressly condemned the practice of *strip searches or body cavity searches* to determine whether students were in violation of school rules. 742 F.2d at 982-83 (emphasis added) (citing with approval *Doe* v. *Renfrow*, 631 F.2d 91, 92-93 (7th Cir. 1980), *cert. denied*, 451 U.S. 1022 (1981)). *In Bellnier* v.

Marshall and Brennan, concurring in part and dissenting in part in *T.L.O.*, was even more explicit. Although he criticized the majority's standard as providing insufficient guidance in many contexts, he emphasized that the *T.L.O.* standard at least clearly established the unlawfulness of a strip search in a case like this one:

> One thing is clear under any standard -- the shocking strip searches that are described in some cases have no place in the schoolhouse. *See Doe* v. *Renfrow*, 631 F.2d 91, 92-93 (CA7 1980) ("It does not require a constitutional scholar to conclude that the nude search of a 13-year-old child is an invasion of constitutional rights of some magnitude"), *cert. denied*, 451 U.S. 1022 (1981); *Bellnier* v. *Lund*, 438 F. Supp. 47 (N.D.N.Y. 1977); *People* v. *D.*, 34 N.Y.2d 483, 358 N.Y.S.2d 403, 315 N.E.2d 466 (1974); *M.J.* v. *State*, 399 So.2d 996 (Fla. App. 1981). To the extent that deeply intrusive searches are ever reasonable outside the custodial context, it surely must only be to prevent imminent, and serious harm.

Lund, the strip search of fifth-grade students down to their underwear in search of $3.00 that one student reported missing was held to violate the Fourth Amendment. 438 F. Supp. at 53-54. The granting of qualified immunity in this pre-*Harlow* case was based on the absence of allegations that the teacher's action was not taken in good faith and its observation that as, of 1974, the law was not settled. *Id.* at 55. The New York Court of Appeals in *People* v. *D* reversed the denial of a suppression motion of a 17-year-old student in a strip search case. The court held that observations of the student twice entering and quickly exiting the restroom with a fellow student, and having lunch with a fellow student who was under suspicion for dealing drugs, as well as suggestions from confidential sources that the defendant himself might be dealing in drugs, provided inadequate information to justify searching the student's wallet and, once drugs were found there, strip searching the student to discover a vial containing pills. 34 N.Y.2d 483, 358 N.Y.S.2d 403, 405, 410, 315 N.E2d 466 (1974).

T.L.O. at 764 n.25. That conclusion was not only unrebutted by the majority, but, as noted above, approved by the majority's embrace of the same cited cases.

Professor Wayne R. LaFave, a leading commentator on the Fourth Amendment, concurs with the view that strip searches are clearly unconstitutional under *T.L.O.*, especially when conducted in response to minor infractions. Although Professor LaFave, too, views *T.L.O.* as unclear in several respects, he concludes that its discussion of the proper scope of schoolhouse searches means "at a minimum" that strip searches such as those described in opinions cited in *T.L.O.* are unconstitutional. WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 10.11 at 817 (3d ed. 1996).[10]

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[10]After *T.L.O.*, publications directed at educators cautioned them against conducting strip searches absent exigent circumstances. *See, e.g.*, LAWRENCE F. ROSSOW, SEARCH AND SEIZURE IN THE PUBLIC SCHOOLS 37 (2d ed.1995) (remarking that the majority of court cases involving strip searches have been decided in favor of the student); Larry Bartlett, *Don't Be in a Rush to Search Students*, 59 THE CLEARING HOUSE 252, 253 (1986) (stating that "[i]t can be inferred that the Court would not look favorably upon strip searches of students in the absence of a search warrant, probable cause, or extreme bona fide emergency."); N.L. Essex, *Ten Ways to Avoid Costly Litigation for Illegal School Searches*, 62 THE CLEARING HOUSE 165, 166 (1988) (remarking that strip searches should be conducted only when there is a threat to the health and safety of students); Brenda Jones Watt, *New Jersey v. T.L.O.: The Questions the Court Did Not Answer About School Searches*, 14 J. L. & EDUC. 421, 426 (1985) (commenting that ". . . it would seem that even after employing the balancing test, the Court would decide that the needs of the school officials to maintain order does not weigh so heavily as to deny the students their rights of privacy with regard to their own persons."); Perry A. Zirkel, *Stripping Students of Their Rights*, 74 PHI DELTA KAPPAN 498, 501 (1993) (stating that Robert Chenoweth, winning attorney for the school in a strip search case, advises school personnel not to conduct strip searches).

The reported cases addressing the constitutionality of student strip searches by school authorities fall into such a clear pattern that they illustrate the degree to which the Fourth Amendment principles this Court has established clearly guide lower courts. Every case that has upheld even a partial strip search in school dealt with a search for weapons or other dangerous contraband, such as illegal drugs, and was based on specific information that those items would likely be found on the student's person. *See, e.g., Cornfield v. Consolidated High Sch. Dist. No. 230*, 991 F.2d 1316, 1320-23 (7th Cir. 1993) (strip search based on strong suspicions student concealing drugs); *Williams v. Ellington*, 936 F. 2d 881, 882-83 (6th Cir. 1991) (strip search after one of suspected students produced drugs during questioning); *Tartar v. Raybuck*, 742 F. 2d 977, 979, 984 (6th Cir. 1984) (strip search based on odor of marijuana and suspicion of dealing drugs); *Widener v. Frye*, 809 F. Supp. 35, 36-37 (S.D. Ohio 1992) (odor of marijuana, dilated pupils, and lethargy justified limited strip search), *aff'd* 12 F.3d 215 (6th Cir. 1993); *Cales v. Howell Pub. Schs.*, 635 F. Supp. 454, 457-58 (E.D. Mich. 1985) (strip search based on suspicion of drugs); *State v. Young*, 234 Ga. 488, 216, S.E. 2d 586, (1975) (strip search based on suspicion of drugs); *Rone by Payne v. Daviess County Bd. of Educ.*, 655 S.W. 2d 28, 29 (Ky. 1983) (consented-to strip search based on students' admission to possessing and dealing drugs).

Conversely, every case that has involved a search for items not posing any imminent risk of serious harm to anyone has held the strip search to be unconstitutional. *See, e.g., Oliver v. McClung*, 919 F. Supp. 1203, 1216-19 (N.D. Ind. 1995) (strip search seeking $4.50 unconstitutional); *Bellnier v. Lund*, 438 F. Supp. 47, 54 (N.D. N.Y. 1977) (strip search for $3.00, "as opposed to drugs"); *State ex rel. Galford v. Mark Anthony B.*, 433 S.E. 2d 41, 49 (W. Va. 1993) (strip search seeking $100 unconstitutional). Indeed, in some

cases, school officials have been found to have violated clearly established law even where they were searching for dangerous contraband such as illegal drugs. *See, e.g., Bilbrey v. Brown*, 738 F. 2d 1462, 1466 (9th Cir. 1984) (strip search and pat-down looking for drugs violated the Constitution); *Doe v. Renfrow*, 631 F. 2d 91, 92-93 (7th Cir. 1980) (per curiam) (strip search for drugs unconstitutional because no individualized suspicion and no reasonable cause), *cert. denied*, 451 U. S. 1022 (1982).

In *T.L.O.*, the Supreme Court explained why educators, though vested with "important, delicate and highly discretionary functions," must take care not to trample upon the rights of the very students they have been entrusted to educate. As the Court explained, "[t]hat they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual in the educational context, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *T.L.O.* 469 U.S. at 334 (quotation omitted). If allowed to stand, the *en banc* decision in this case will teach students, and others, to put little faith in important principles of government.

B. The Decision Below Conflicts With Decisions of the Sixth and Seventh Circuits, and the Highest Court of at Least One State

The *en banc* court's holding that petitioners lacked a clearly established Fourth Amendment right not to be strip searched by a teacher looking for a small amount of money conflicts with decisions of the Sixth and Seventh Circuits and the highest court of at least one state. The Seventh Circuit in *Doe v. Renfrow*, held that a strip search of junior high school students by school officials violated the students' clearly established Fourth Amendment rights. The court stated:

> It does not take a consitutional scholar to conclude that a nude search of a thirteen-year-old child is an invasion of constitutional rights of some magnitude. More than that: it is a violation of any known principle of human decency. Apart from any constitutional readings and rulings, simple common sense would indicate that the conduct of the school officials in permitting such a nude search was not only unlawful but outrageous under settled principles of law.

631 F.2d at 92-92 (quotation marks omitted). The court concluded by stating: "We suggest as strongly as possible that the conduct herein described exceeded the 'bounds of reason' by two and a half country miles." *Id.* at 93.

Since *T.L.O.* the Seventh Circuit has reaffirmed its decision in *Renfrow*. *See Cornfield v. Consolidated High Sch. Dist. No. 230,* 991 F.2d 1316 (7th Cir. 1993*)*. The Court in Cornfield, relying on *T.L.O.*, made clear that it would be unconstitutional for a school official to strip search students for a minor infraction, including searching for allegedly missing money. Although the Seventh Circuit upheld the strip search for drugs in *Cornfield*, it took pains to point out that, had the case involved a minor type of infraction such a highly intrusive search would not comport with the sliding scale advocated by this Court in *T.L.O. Cornfield,* 991 F.2d at 1320. The court noted that the degree of suspicion the Fourth Amendment requires increases correspondingly with the intrusiveness of a search of a student. *Id.* at 1321. Thus, what is reasonable suspicion for search of a student's locker, pocket, or pocketbook -- or backpack, as in this case -- "may fall well short of reasonableness for a nude search." *See id.* The *en banc* court's decision conflicts with the Seventh Circuit's repeated recognition of students' clearly established Fourth Amendment rights not to be strip searched for minor infractions.

The Sixth Circuit likewise recognizes that school children have a clearly established right under *T.L.O.* not to be strip searched for minor infractions. In *Williams v. Ellington*, 936 F.2d 881 (6th Cir. 1991), the court granted qualified immunity on the facts before it, but did so only after meticulously cataloguing the actions school officials undertook prior to conducting the strip search to ensure that they had a concrete basis for conducting the search. 936 F.2d at 887-89. Under the Sixth Circuit's approach in *Williams*, respondents' bases for strip searching petitioners were patently inadequate.

The decision of the West Virginia Supreme Court in *State ex rel. Galford v. Mark Anthony B.*, 433 S.E. 2d 41 (W. Va. 1993), also conflicts with the *en banc* court of appeals' decision in this case. The West Virginia Supreme Court found that a student has a clearly established constitutional right not to be strip searched by a teacher searching for missing money. *Id.* at 49. That court read *T.L.O.* as "obviously" putting "constraints on how far a search could ultimately extend, even when there are 'reasonable grounds' and/or an individualized suspicion to justify the initial search." *Id.* at 48-49. The court held that, absent exigent circumstances necessitating an immediate search to protect other students, "a warrantless strip search of a student conducted by a school official is presumed to be 'excessively intrusive' and thus unreasonable in scope." *Id.* at 49.

CONCLUSION

For the foregoing reasons, petitioners pray that this Court grant the writ of certiorari.

Respectfully submitted,

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Dated: AUGUST 29, 1997

APPENDIX

Opinion of the Court of Appeals *En Banc*

(June 2, 1997)

Cassandra JENKINS, a minor, by her mother and next friend, Sandra HALL; Oneika McKenzie, a minor, by her mother and next friend, Elizabeth McKenzie,

Plaintiffs-Appellants,

v.

TALLADEGA CITY BOARD of EDUCATION; Susannah Herring, individually and in her capacity as a teacher of Graham Elementary School, Melba Sirmon, individually and in her capacity as counselor at Graham Elementary School,

Defendants-Appellees,

Charles Kurley, in his official capacity as Superintendent of the Talladega City School District, et al., Defendants.

No. 95-6243.

United States Court of Appeals,
Eleventh Circuit.
June 2, 1997.

Rose Mary Sanders, Chestnut Sanders, Sanders & Pettaway, P.C., Selma, AL, Devarieste Curry Beveridge &

Diamond, P.C., Washington, DC, for Plaintiffs-Appellants.

Donald B. Sweeney, Jr., Valerie Theresa Kisor, Rives & Peterson, Birmingham, AL, Ralph D. Gaines, Jr., Gaines, Gaines & Rasco, Talladega, AL, for Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Alabama.

Before HATCHETT, Chief Judge, TJOFLAT, ANDERSON, EDMONDSON, COX, BIRCH, DUBINA, BLACK, CARNES and BARKETT, Circuit Judges, and KRAVITCH,* Senior Circuit Judge.

BIRCH, Circuit Judge:

This case involves the application of the well-established precepts of qualified immunity to a specific set of facts that concern a search of elementary school-children who were suspected of having stolen money from a classmate. The district court granted summary judgment in favor of the defendants on all claims. For the reasons that follow, we affirm.

I. BACKGROUND

Certain critical facts in this case are disputed by the parties. For the limited purpose of our analysis of the issue of qualified immunity at the summary judgment

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*Senior U.S. Circuit Judge Phyllis A. Kravitch elected to participate in this decision pursuant to 28 U.S.C. § 46(c).

stage, we are bound to view the facts in the light most favorable to the plaintiffs. *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed.2d 176 (1962) (*per curiam*). In 1992, at the time the events giving rise to this action occurred, Cassandra Jenkins and Oneika McKenzie were eight-year-old second graders in elementary school in Talladega, Alabama. On the afternoon of May 1, one of Jenkins' and McKenzie's classmates informed their teacher, Hilda Fannin, that $7.00 was missing from her purse. Based on a student's accusation that Jenkins had placed the money in McKenzie's backpack, Fannin initially searched the backpack but failed to find the money there. Several students subsequently implicated Jenkins, McKenzie, and a male classmate, Anthony Jamerson, in the alleged theft. Fannin took the children into the hallway and questioned them regarding the money, at which time Jenkins and McKenzie mutually accused each other of the theft. At the suggestion of another teacher, Susannah Herring, Fannin asked the students to remove their socks and shoes. When these efforts failed to reveal the allegedly stolen money, Herring, along with a guidance counselor, Melba Sirmon, who had by this time become involved in the situation, directed Jenkins and McKenzie to the girls' restroom. Jenkins testified that Herring ordered them to enter the bathroom stalls and come back out with their underpants down to their ankles. McKenzie offered conflicting testimony as to whether they were instructed to put their clothes back on while inside the bathroom stall or exit the stalls unclothed. Jenkins' and McKenzie's testimony is consistent, however, with respect to the assertion that they were asked to remove their clothes while inside the restroom.

Having again failed to discover the missing money, Herring and Sirmon brought Jenkins, McKenzie, and Jamerson to the office of the school principal, Crawford Nelson. In response to Nelson's inquiries regarding the money, Jamerson volunteered that it was hidden behind a file cabinet. A search in that location failed to uncover the money. Jenkins and McKenzie both contend that Herring then escorted them to the restroom a second time where they were again asked to remove their clothes in an effort to locate the $7.00.

The parents of Jenkins and McKenzie filed a complaint on their behalf against the Talladega City Board of Education and nine individual defendants. In the complaint, the plaintiffs alleged, pursuant to 42 U.S.C. s 1983, that Jenkins and McKenzie had been strip-searched in violation of their rights provided under the Fourth and Fourteenth Amendments. In addition, the complaint set forth violations of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, and Alabama law. In a series of memorandum opinions, the district court dismissed all claims for money damages and granted summary judgment in favor of (1) all defendants on plaintiffs' Title VI and Title IX claims; (2) the Board of Education with respect to the plaintiffs' § 1983 claims; (3) all individually-named defendants on the basis of qualified immunity; and (4) all defendants on all remaining federal claims for injunctive and declaratory relief, and all state law claims. We affirm the district court's disposition of this case in its entirety. Because we believe that the only issue raised in this appeal that warrants further examination concerns the court's determination that the individual defendants are entitled to qualified immunity with respect to the plaintiffs' Fourth

Amendment § 1983 claims, our discussion is confined solely to this issue.

II. DISCUSSION

The principles of qualified immunity set out in *Lassiter v. Alabama A & M Univ.*, 28 F.3d 1146 (11th Cir. 1994) (*en banc*), continue to be the guiding directives for deciding cases involving the question of a state actor's entitlement to qualified immunity in this circuit. Although these rules have been identified on numerous occasions, we reiterate some of them here to establish and clarify the framework that necessarily informs our analysis of the issue before us. "Qualified immunity protects government officials performing discretionary functions from civil trials (and the other burdens of litigation, including discovery) and from liability if their conduct violates no 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Lassiter*, 28 F.3d at 1149 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982)). "For the law to be clearly established to the point that qualified immunity does not apply, the law must have earlier been developed in such a concrete and factually defined context to make it obvious to all reasonable government actors, in the defendant's place, that 'what he is doing' violates federal law." *Id.* (citing *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039, 97 L. Ed. 2d 523 (1987)). "For qualified immunity to be surrendered, pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like- situated, reasonable government agent that what defendant is doing violates federal law in the circumstances." *Lassiter*, 28 F.3d at 1150. Plaintiffs submit that on May 1, 1992, the law

regarding the constitutionally permissible scope of a search of students while attending school was so clearly defined that these defendants were on notice that the type of search conducted in this instance violated Jenkins' and McKenzie's rights guaranteed by the Fourth Amendment. In support of this proposition, plaintiffs point to the Supreme Court's application of the Fourth Amendment in the context of school searches in *New Jersey v. T.L.O.*, 469 U.S. 325, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985).[1] *T.L.O.* involved the search of a fourteen-year-old high school student's purse after the student was discovered smoking in the lavatory in violation of school rules. More specifically, a teacher found T.L.O. and a companion smoking in the restroom and took them to the principal's office where, in the presence of the assistant vice principal, the companion admitted--and T.L.O denied--having committed the infraction with which they were accused. The vice principal proceeded to examine T.L.O.'s purse to ascertain whether it contained cigarettes. When the search revealed a pack of cigarettes, the vice principal removed the pack and observed within the purse a package of rolling papers. Further exploration revealed the presence of a small quantity of marijuana along with several items of drug paraphernalia.

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[1]The parties agree that, at the time the events giving rise to this action occurred, *T.L.O.* was the only case that had addressed with any specificity the Fourth Amendment implications of school searches. As a result, it is uncontested that, under the facts of this case, *T.L.O.* is the sole precedent that potentially could have clearly established the law for purposes of qualified immunity analysis.

The Supreme Court determined at the outset that the Fourth Amendment applied to searches conducted by school authorities. *T.L.O.*, 469 U.S. at 335, 105 S. Ct. at 740. The Court, however, rejected the proposition that searches within the school setting must be based on probable cause as that term is understood in the context of Fourth Amendment jurisprudence; rather, the Court articulated the following standard to guide a pragmatic analysis of Fourth Amendment claims of this sort:

> [T]he legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search. Determining the reasonableness of any search involves a twofold inquiry: first, one must consider "whether the . . . action was justified at its inception"; second, one must determine whether the search as actually conducted "was reasonably related in scope to the circumstances which justified the interference in the first place." Under ordinary circumstances, a search of a student by a teacher or other school official will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.

T.L.O., 469 U.S. at 341-42, 105 S. Ct. at 742-43 (citations omitted). Plaintiffs acknowledge that the factual circumstances set forth in *T.L.O.* differ significantly from

those present in this action, but suggest that the aforementioned language sufficiently delineated the factors that necessarily must inform school authorities who seek to search a student suspected of breaching a school regulation such that the defendants in this case reasonably must have known that their search of Jenkins and McKenzie--and particularly that aspect of the search that involved the removal of articles of clothing--exceeded the bounds of "reasonableness" established by the Court in *T.L.O.* We disagree.[2]

Notwithstanding the Court's enunciation in *T.L.O.* of a two-part test to adjudicate Fourth Amendment school-search claims, the Court did not apply its own test strictly to the facts presented in that case; indeed, after finding that the initial decision to open T.L.O.'s purse to search for cigarettes was justified in light of a teacher's report that the student had been smoking in the restroom, the Court concluded that

> [t]he suspicion upon which the search for marihuana was founded was provided when Mr. Choplick observed a package of rolling papers in the purse as he removed the pack of cigarettes. . . . The discovery of the rolling papers concededly gave rise to a reasonable suspicion that T.L.O. was

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[2]Because we conclude that, on May 1, 1992, the law regarding school searches was not clearly established to the extent that these defendants should have known that their conduct violated constitutionally permissible norms, we need not reach the question of whether Jenkins' and McKenzie's Fourth Amendment rights were, in fact, violated.

> carrying marihuana as well as cigarettes in her purse. This suspicion justified further exploration of T.L.O.'s purse, which turned up more evidence of drug-related activities . . . . Under these circumstances, it was not unreasonable to extend the search to a separate zippered compartment of the purse; and when a search of that compartment revealed an index card containing a list of "people who owe me money" as well as two letters, the inference that T.L.O. was involved in marihuana trafficking was substantial enough to justify Mr. Choplick in examining the letters to determine whether they contained any further evidence. In short, we cannot conclude that the search for marihuana was unreasonable in any respect.

T.L.O., 469 U.S. at 347, 105 S. Ct. at 745-46. Specific application of the factors established to define the constitutionally permissible parameters of a school search--that is, that it be "reasonably related to the objectives of the search" and "not excessively intrusive in light of the age and sex of the student and the nature of the infraction"--is notably absent from the Court's discussion and conclusion with respect to T.L.O. The Court's determination is grounded solely in the notion that each successive discovery of items in T.L.O.'s purse by the vice principal provided reasonable suspicion and thereby legitimated further searching. There is no illustration, indication, or hint as to how the enumerated

factors might come into play when other concrete circumstances are faced by school personnel.[3]

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[3]The dissent contends that the Supreme Court's recent decision in *United States v. Lanier*, --- U.S. ----, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997), calls into question our conclusion that *T.L.O.*, while establishing general principles that necessarily must govern any Fourth Amendment analysis of a school search, did not explicitly apply those principles to specific facts such that the defendants--and any reasonable individuals faced with the same circumstances--should have known that their conduct in this case violated clearly established constitutional norms. *Lanier*, however, is entirely consistent with both the reasoning and result reached by our court in this case.

Lanier concerned a challenge to a criminal conviction under 18 U.S.C. § 242, the criminal-law counterpart to 42 U.S.C. § 1983. The underlying conduct giving rise to the criminal civil rights violation involved numerous sexual assaults committed by a state court judge. The Sixth Circuit initially affirmed the conviction but, on rehearing *en banc*, reversed after finding that the statute failed to supply adequate notice that sexual assault by a state actor fell within the parameters of constitutionally prohibited conduct. *See United States v. Lanier*, 73 F.3d 1380, 1384 (6th Cir. 1996) (*en banc*). The court further noted that the right violated in this case had not been identified with sufficient clarity as a constitutional right:

> The right deprived in the instant case--the right not to be assaulted--is a clear right under state law

> known to every reasonable person. The defendant certainly knew his conduct violated the law. But it is not publicly known or understood that this right rises to the level of a "constitutional right." It has not been declared such by the Supreme Court. . . . The indictment in this case for a previously unknown, undeclared and undefined constitutional crime cannot be allowed to stand.

Lanier, 73 F.3d at 1392-94. In reaching its determination that the contours of the right at issue had not previously been delineated, the court reasoned that, consistent with Supreme Court precedent, a constitutional right under § 242 must be "ma[d]e specific" to render the indictment under the statute constitutionally sound:

> As we interpret the "make specific" requirement, the Supreme Court must not only enunciate the existence of a right, it must also hold that the right applies to a factual situation fundamentally similar to the one at bar. . . . The "make specific" standard is substantially higher than the "clearly established" standard used to judge qualified immunity in section 1983 cases.

Id. at 1393.

The Supreme Court granted certiorari "to review the standard for determining whether particular conduct falls within the range of criminal liability under § 242." *Lanier*, --- U.S. at ----, 117 S. Ct. at 1224. In reversing the Sixth Circuit's decision, the Court observed that the necessity for a constitutional right to be "made specific" stemmed

from the constitutional requirement that individuals be given fair warning as to what constitutes proscribed conduct; consistent with this requirement, the Court concluded that, contrary to the Sixth Circuit's stated view, the "made specific" standard was identical to the "clearly established" standard employed in qualified immunity cases:

> In the civil sphere, we have explained that qualified immunity seeks to ensure that defendants reasonably can anticipate when their conduct may give rise to liability by attaching liability only if the contours of the right violated are sufficiently clear that a reasonable official would understand that what he is doing violates that right. So conceived, the object of the "clearly established" immunity standard is not different from that of "fair warning" as it relates to law "made specific" for the purpose of validly applying § 242. . . . [As] with civil liability under § 1983 or *Bivens*, all that can usefully be said about criminal liability under § 242 is that it may be imposed for deprivation of a constitutional right if, but only if, in light of pre-existing law the unlawfulness under the Constitution is apparent. Where it is, the constitutional requirement of fair warning is satisfied.

Lanier, --- U.S. at ---- - ----, 117 S. Ct. at 1227-28 (citations, quotations and internal markings omitted). It is true that the Court described the appropriate standard as being whether the unlawfulness is apparent in light of pre-existing law. Although this circuit has elaborated and

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said that "pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about)" the unlawfulness of the challenged conduct, *Lassiter*, 28 F.3d at 1150, we do not believe that our elaboration indicates a standard substantively different from that of the Supreme Court. The Court in *Lanier* does not address or alter in any way our understanding of the underlying purpose or legal framework with respect to qualified immunity; rather, the Court's holding equates the standard of specificity required to provide fair warning in a criminal context under § 242 with that required to clearly establish the law for purposes of civil liability.

The dissent also points to the Court's declaration that "general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful.' " *Lanier*, at ----, 117 S. Ct. at 1227. The Court went on to note that " '[t]he easiest cases don't even arise. There has never been . . . a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages [or criminal] liability.' " *Id.* (quoting *Lanier*, 73 F.3d at 1410 (Daughtrey, J., dissenting)) (internal quotation marks omitted) (alterations in original). We do not believe our decision today suggests a view of qualified immunity contrary to the spirit of the preceding statements; indeed, although general principles of law can provide fair warning, they do not necessarily provide such warning unless the

In the absence of detailed guidance, no reasonable school official could glean from these broadly-worded phrases whether the search of a younger or older student might be deemed more or less intrusive; whether the search of a boy or girl is more or less reasonable, and at what age or grade level; and what constitutes an infraction great enough to warrant a constitutionally reasonable search or, conversely, minor enough such that a search of property or person would be characterized as unreasonable. In short, as conceded by the plaintiffs, neither the Supreme Court nor any court in this circuit nor the Alabama courts, on or before May 1, 1992, had ever actually applied the test established in *T.L.O.* to define a reasonable (or unreasonable) search in the context of facts materially similar to those of this school search.[4] Without such practical, fact-based application,

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constitutional rule at issue may be applied "with obvious clarity." As acknowledged by the dissent, the question is whether *T.L.O.* established "with obvious clarity" that the school search at issue was unconstitutional. Put simply, we do not think this is an "easy" case, nor do we view *T.L.O.* as applicable to the instant facts "with obvious clarity."

[4]In this circuit, the law can be "clearly established" for qualified immunity purposes only by decisions of the U.S. Supreme Court, Eleventh Circuit Court of Appeals, or the highest court of the state where the case arose. *Hamilton v. Cannon*, 80 F.3d 1525, 1532 n. 7 (11th Cir. 1996) (*citing Courson v. McMillian*, 939 F.2d 1479, 1497-98 & n. 32 (11th Cir. 1991)). The dissent notes a "tension" between our circuit's decisional law deeming relevant solely in-circuit precedent, on the one hand, and the Supreme

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Court's seeming rejection in *Lanier*, on the other hand, of a categorical rule prohibiting consideration of decisions of the Court of Appeals or other courts to ascertain whether the law has been clearly established. Significantly, however, the Supreme Court's discussion of the relevance of case law from other courts arose in the context of the Court's pointed criticism and rejection of the Sixth Circuit's determination that only Supreme Court precedent could clearly establish the law for purposes of 18 U.S.C. § 242. In *United States v. Lanier*, 73 F.3d 1380 (6th Cir. 1996) (*en banc*), the Sixth Circuit had held explicitly that "[l]ower court decisions are not sufficient to establish and make definite a particular constitutional crime so as to provide the constitutionally-required notice necessary to support an indictment under § 242. Only a decision of the Supreme Court establishing the constitutional crime under § 242 can provide such notice." *Id.* at 1393. In reviewing the Sixth Circuit's decision, the Supreme Court explicitly rejected the notion that only its decisions could provide fair warning under the applicable statute; rather, the Court stated that, in inquiring whether a previous judicial decision has made specific the scope of a constitutional right, "no . . . case has held that the universe of relevant interpretive decisions is confined to our opinions." *Lanier*, --- U.S. at ----, 117 S. Ct. at 1225. Indeed, the "universe of interpretive decisions" to which our court looks is broader than that envisioned by the Sixth Circuit and includes, as suggested by the Supreme Court, our own circuit precedent and that of the highest state court where the pertinent conduct took place. The Supreme Court in *Lanier* simply did not address the extent to which decisions of the "lower courts" must, should, or may be considered in deciding whether a

school officials in this circuit were left to interpret, balance, and evaluate such terms as "measures . . . reasonably related to the objectives of the search," and "not excessively intrusive in light of the age and sex of the student and the nature of the infraction." *T.L.O.*, 469 U.S. at 342, 105 S. Ct. at 743. As we have previously noted, "[p]ublic officials are not obligated to be creative or imaginative in drawing analogies from previously decided cases." *Adams v. St. Lucie County Sheriff's Dept.*, 962 F.2d 1563, 1575 (11th Cir. 1992) (Edmondson, J., dissenting), *dissent approved en banc*, 998 F.2d 923 (11th Cir. 1993) (*per curiam*). Similarly, school officials cannot be required to construe general legal formulations that have not once been applied to a specific set of facts by any binding judicial authority.[5]

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constitutional right has been clearly established, nor did it identify any impropriety in considering only the decisions of the circuit or highest court of the state in which the relevant events took place. We therefore do not construe *Lanier* as being in conflict with our precedent regarding the relevant decisional law to which we must look in analyzing a claim of qualified immunity.

[5]The dissent submits that although the initial search of McKenzie's backpack was justified, the subsequent searches of Jenkins and McKenzie were not based on reasonable suspicion. The dissent further criticizes our decision as failing to evaluate whether the teachers had reasonable suspicion to perform the challenged searches in the bathroom. Once the teachers formed reasonable suspicion that Jenkins and McKenzie might have stolen the money, however, the search was then "justified at its inception." *T.L.O.*, 469 U.S. at 341-42, 105 S. Ct. at

742-43. The relevant question with respect to the continuation of the search, in our view, is not whether the teachers had reasonable suspicion with respect to each place they searched but, rather, whether the search itself was constitutionally reasonable in scope. Stated differently, once the teachers formulated reasonable suspicion that Jenkins and McKenzie had stolen the money (a fact that the dissent does not dispute), the relevant inquiry is whether *T.L.O.* directed the conclusion that the manner in which the teachers chose to conduct further searching exceeded constitutionally permissible bounds in extent and scope. The teachers, after all, still had reasonable suspicion that money had been stolen, and had not necessarily eliminated Jenkins and McKenzie as suspects when the backpack-search proved fruitless. Contrary to the dissent's suggestion, we have not ignored the question of reasonable suspicion but believe that the pertinent issue in this case is whether, at the time these events took place, the law was clearly established that all individuals in the defendants' place should have known that, after reasonable suspicion was formed that McKenzie and Jenkins might have stolen the missing money and an initial search of the backpack failed to reveal the money, the continued searching of these girls in the restroom exceeded the scope of a constitutionally permissible school search.

With respect to the scope of the searches, it is apparent that the instant searches were reasonably related to the objective of uncovering the stolen $7.00. We also reject appellants' attempt to trivialize the nature of the infraction; the stealing of $7.00 in an elementary classroom reasonably could be considered by the school

Indeed, not only does the language used by the Court to announce a legal standard regarding the permissible scope of a reasonable school search lack specificity[6] but, it appears, purposefully so. In response

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officials to be a matter of serious concern. Appellants' primary argument is that the searches were excessively intrusive. However, the female students were searched by female teachers. The students were eight years old, and thus prepubescent. Finally, it is a matter of common experience that teachers frequently assist students of that age in the bathroom, *e.g.*, in the event of an accidental wetting. We do not believe that it would be apparent to a reasonable school official that the challenged searches were "excessively intrusive in light of the age and sex of the student[s] and the nature of the infraction." *T.L.O.*, 469 U.S. at 342, 105 S. Ct. at 743.

[6]It is worth noting that the dissenting justices in *T.L.O.* criticized the majority's reliance on the "reasonableness" test precisely because it is ambiguous and imprecise. Justice Brennan, joined by Justice Marshall, described the Court's standard as "unclear," *T.L.O.*, 469 U.S. at 354, 105 S. Ct. at 749, and "an unguided 'balancing test,' " *id.* at 356, 105 S. Ct. at 750. Justice Stevens was even more harsh in his censure:

> As compared with the relative ease with which teachers can apply the probable-cause standard, the amorphous "reasonableness under all the circumstances" standard freshly coined by the Court today will likely spawn increased litigation and greater uncertainty among teachers and administrators. . . . I cannot but believe that the

to Justice Stevens' criticism of this standard on the ground, among others, that the Court had failed to distinguish between types of infractions that might reasonably justify a search, Justice White, writing for the majority, explained:

> We are unwilling to adopt a standard under which the legality of a search is dependent upon a judge's evaluation of the relative importance of various school rules. The maintenance of discipline in the schools requires not only that students be restrained from assaulting one another, abusing drugs and alcohol, and committing other crimes, but also that students conform themselves to the standards of conduct prescribed by school authorities. . . . The promulgation of a rule forbidding specified conduct presumably reflects a judgment on the part of school officials that such conduct is destructive of school order or of a proper educational environment. Absent any suggestion that the rule violates some substantive constitutional guarantee, the courts should, as a

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> same school system faced with interpreting what is permitted under the Court's new "reasonableness" standard would be hopelessly adrift as to when a search may be permissible.

Id. at 365, 105 S. Ct. at 755. Several members of the Court thus expressly anticipated that the "reasonableness" standard--particularly in the absence of any clear application to facts--would fail to provide school officials with a systematic way to predict when their conduct might violate the law.

> general matter, defer to that judgment and refrain from attempting to distinguish between rules that are important to the preservation of order in the schools and rules that are not.

T.L.O., 469 U.S. at 342 n. 9, 105 S. Ct. at 743 n. 9. The foregoing discussion not only indicates the Court's deliberate hesitation to narrow and define explicitly, in a practical, factual sense, the terminology used to establish its "reasonableness" test but, more importantly, further suggests that *T.L.O.* did not attempt to establish clearly the contours of a Fourth Amendment right as applied to the wide variety of possible school settings different from those involved in *T.L.O.* Faced with a series of abstractions, on the one hand, and a declaration of seeming deference to the judgments of school officials, on the other, it is difficult to discern how *T.L.O.* could be interpreted to compel the conclusion that these defendants--or, more accurately, all reasonable educators standing in defendants' place--should have known that their conduct violated a clearly established constitutional right.

III. CONCLUSION

We will not engage in polemics regarding the wisdom of the defendants' conduct in this case; suffice it to say that the defendants likely exercised questionable judgment given the circumstances with which they were confronted. Our job, however, is to decide a narrow legal issue in light of our binding circuit precedent: on May 1, 1992, the date on which the relevant conduct at issue in this case occurred, was the law clearly established such that all reasonable teachers standing in the defendants' place reasonably should have known that the search to

locate allegedly stolen money violated Jenkins' and McKenzie's Fourth Amendment rights? Applying the principles explicitly stated in Lassiter, we conclude that, at the time these events took place, the law pertaining to the application of the Fourth Amendment to the search of students at school had not been developed in a concrete, factually similar context to the extent that educators were on notice that their conduct was constitutionally impermissible. Accordingly, the defendants are entitled to qualified immunity in this case. We AFFIRM.

KRAVITCH, Senior Circuit Judge, dissenting in which HATCHETT, Chief Judge, and BARKETT, Circuit Judge, join:

I fully agree that government officials acting within their discretionary authority should be shielded from liability for violating rights of which a reasonable person would not have known. The majority and I differ only as to whether the schoolhouse Fourth Amendment standard announced by the Supreme Court in *New Jersey v. T.L.O.*, 469 U.S. 325, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985), would lead a reasonable person to understand that the conduct in this case was prohibited. The majority finds qualified immunity by characterizing the Supreme Court's test as too general to guide any teacher, unless subsequent controlling precedent has applied it to virtually identical facts. In my view, stating that a constitutional test is general or that factually similar precedent is lacking bypasses the fundamental inquiry set out by the Supreme Court: determining whether the governing constitutional standard provides sufficient guidance, given the facts of the case, "that a reasonable official would understand that what he is doing violates [a constitutional] right." *Anderson v. Creighton*, 483 U.S. 635,

640, 107 S. Ct. 3034, 3039, 97 L. Ed. 2d 523 (1987). Because I believe that *T.L.O.* sufficiently forewarns teachers that strip searching eight-year-olds in pursuit of a few dollars violates the Fourth Amendment, I respectfully dissent.

Qualified immunity balances the competing concerns present in civil rights suits. Immunity serves the public " 'need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority.' " *Harlow v. Fitzgerald*, 457 U.S. 800, 807, 102 S. Ct. 2727, 2732, 73 L. Ed. 2d 396 (1982) (quoting *Butz v. Economou*, 438 U.S. 478, 506, 98 S. Ct. 2894, 2911, 57 L. Ed. 2d 895 (1978)). Taken too far, however, immunity can undermine the purpose of section 1983 altogether, giving officials license to violate the most basic and longstanding constitutional rights. Qualified immunity accommodates these interests by protecting those who act in reasonable reliance upon established legal principles but permitting liability for clearly unconstitutional conduct. Thus, immunity attaches only when official "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818, 102 S. Ct. at 2738.

Interpreting the term "clearly established," the Supreme Court has warned courts not to base liability upon expansive legal truisms or to ignore material factual differences between present cases and precedent establishing the asserted constitutional right. In *Anderson*, the Court emphasized that a right is not clearly established unless "[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." 483

U.S. at 640, 107 S. Ct. at 3039.[1] We since have stated that "[g]eneral propositions have little to do with . . . qualified immunity." *Muhammad v. Wainwright*, 839 F.2d 1422, 1424 (11th Cir. 1987). Thus, qualified immunity applies where the plaintiff can identify only unworkable abstractions from prior case law and cannot show how those principles would be applied later to different facts.[2] Neither the Supreme Court nor this court, however, require factual identity between prior and subsequent cases, for that would create absolute immunity.[3]

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[1]We have explained that "the law must have earlier been developed in such a concrete and factually defined context to make it obvious to all reasonable government actors, in the defendant's place, that 'what he is doing' violates federal law." *Lassiter v. Alabama A & M Univ., Bd. of Trustees*, 28 F.3d 1146, 1149 (11th Cir. 1994) (*en banc*).

[2]For example, if the present case had arisen prior to *T.L.O.*, a teacher would have had no reasonable way of knowing when she could search a given student, because the Fourth Amendment had been haphazardly applied to schools. Some courts had held that it permitted searches only upon probable cause, *see State v. Mora*, 330 So. 2d 900 (La.), *cert. denied*, 429 U.S. 1004, 97 S. Ct. 538, 50 L. Ed. 2d 616 (1976); others had held that school children enjoyed no Fourth Amendment protection, as school officials acted *in loco parentis*. *See In re Donaldson*, 269 Cal. App. 2d 509, 75 Cal. Rptr. 220 (3d Dist. Ct. App. 1969).

[3]*See Anderson*, 483 U.S. at 640, 107 S. Ct. at 3039 ("This is not to say that an official action is protected by qualified immunity unless the very action in question has

I review these principles because the majority has taken a rigid approach to their application in the present case. Our various formulations of the "clearly established" test--that prior cases must be factually similar to the case at bar, that general abstractions are unhelpful--represent a shorthand way of saying that the clarity of a constitutional right (and, therefore, official liability) depends upon the interplay of the legal standard and the factual context to which the plaintiff alleges it applies. But it is not enough simply to label pre-existing law "general," or to identify factual distinctions in relevant precedent. Instead, a court must determine whether the generality of a rule casts doubt on its application to the present case or whether factual distinctions from prior precedent are "material," that is, they make the legal rule inapplicable in the later case or suggest that the present conduct is permissible.[4] By contrast, the majority today, declaring *T.L.O.* both general and factually

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previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.") (citations omitted); *Adams v. St. Lucie County Sheriff's Dept.*, 962 F.2d 1563, 1575 (11th Cir. 1992) (Edmondson, J., dissenting), *approved en banc*, 998 F.2d 923 (11th Cir. 1993) ("The facts [of prior precedent] need not be the same as the facts of the immediate case. But they do need to be materially similar.").

[4]For example, in *Hartsfield v. Lemacks*, 50 F.3d 950 (11th Cir. 1995), we rejected a qualified immunity defense in the face of a broad constitutional test. On the facts of that case, we held the police clearly failed to make "reasonable efforts" to avoid erroneous execution of a search warrant, thereby violating the Fourth Amendment.

distinguishable, abandons further analysis. This, I believe, is error.

As the Supreme Court recently reaffirmed, the search for specific rules in factually concrete cases should not overshadow the purpose of such a search--determining whether the government actor had fair warning that his/her conduct was unconstitutional. In *United States v. Lanier*, --- U.S. ----, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997), the Court unanimously held that: (1) civil rights liability requires only "fair warning" of constitutional rights, --- U.S. at ---- - ----, 117 S. Ct. at 1224-27; and (2) neither prior Supreme Court precedent nor factually similar precedent is necessary to provide such warning. The Court confirmed that decisional law generally, not only from the Supreme Court, can establish a right. *Id.* at ---- - ----, 117 S. Ct. at 1226-27.[5] More

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[5]I note the tension between the Court's reasoning and the majority's suggestion, *ante* at 824 n. 2, that only the Supreme Court, Eleventh Circuit, or the highest court of the state can "clearly establish" the law. *Compare Courson v. McMillian*, 939 F.2d 1479, 1497-98 (11th Cir. 1991) (only in-circuit precedent relevant) and *Hansen v. Soldenwagner*, 19 F.3d 573, 578 n. 6 (11th Cir. 1994) (same) *with Lanier*, --- U.S. at ---- - ----, 117 S. Ct. at 1226-27 ("Although the Sixth Circuit was concerned . . . that disparate decisions in various Circuits might leave the law insufficiently certain even on a point widely considered, such a circumstance may be taken into account in deciding whether the warning is fair enough, without any need for a categorical rule that decisions of the Courts of Appeals and other courts are inadequate as a matter of law to provide it."); *Elder v. Holloway*, 510

importantly for present purposes, the Court stressed that rights founded on general statements of law may be enforced against government actors. It observed that "notable factual distinctions" between prior cases and later ones did not require automatic immunity:

> [G]eneral statements of the law are not inherently incapable of giving fair and clear warning, and . . . a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though "the very action in question has [not] previously been held unlawful". . . .

Id. at ----, 117 S. Ct. at 1227 (quoting *Anderson*, 483 U.S. at 640, 107 S. Ct. at 3039). The purpose of factual specificity is to warn government officials when a constitutional test does not, by its own terms, apply to present actions. Thus, it is necessary only when "an earlier case expressly leaves open whether a general rule applies to the particular type of conduct at issue. . . ." *Id.*[6]

U.S. 510, 515- 16, 114 S. Ct. 1019, 1023, 127 L. Ed. 2d 344 (1994) ("A court engaging in review of a qualified immunity judgment should . . . use its full knowledge of its own and other relevant precedents.") (internal alterations and quotations omitted) *and Greason v. Kemp*, 891 F.2d 829, 833 (11th Cir. 1990) ("we look to the law established by the Supreme Court, the courts of appeals, and the district courts.").

[6]The majority dismisses *Lanier* as irrelevant to the instant case. I cannot agree. Although it concedes that

Lanier is consistent both with prior Supreme Court precedent and the policy underlying qualified immunity. The Court has always required only that the "unlawfulness must be apparent," *Anderson*, 483 U.S. at 640, 107 S. Ct. at 3039, so actors "reasonably can anticipate when their conduct may give rise to liability. . . ." *Davis v. Scherer*, 468 U.S. 183, 195, 104 S. Ct. 3012, 3019, 82 L. Ed. 2d 139 (1984). Further, excepting all unconstitutional conduct governed by "general" constitutional standards would vitiate the balance struck by qualified immunity, as officials in clear violation of broad rules would escape liability.

Thus, we cannot dismiss *T.L.O.* by attaching the appellation "general" to the test it announces or by pointing to the absence of prior factually similar cases. In *T.L.O.*, the Supreme Court noted lower courts' conflicting views regarding the application of the Fourth Amendment to schools, 469 U.S. at 332 n. 2, 105 S. Ct. at 737 n. 2, and squarely addressed the issues before us today: when a

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"general principles of law can provide clear warning," *ante* at 826 n.3 (emphasis omitted), the majority is unwilling to accept *T.L.O.*'s guidance in the absence of its application to "facts materially similar to those of this school search." *Id.* at 826. Likewise, it reasons that "school officials cannot be required to construe general legal formulations that have not once been applied to a specific set of facts by any binding judicial authority." *Id.* at 827. I believe this analysis ignores *Lanier*'s intent and, indeed, the Court's intent throughout its qualified immunity jurisprudence. *Lanier* and its precursors make liable those who violate established constitutional norms, even ones with a short pedigree in the decisional law.

search by a school official is authorized, and how intrusive a search the Fourth Amendment tolerates. As the majority recounts, the Court adopted a test born of the *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), "reasonableness" standard, but did not leave us with reasonableness alone. It announced a two-pronged test: first, the search must be justified at its inception, that is, "there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school," 469 U.S. at 342, 105 S. Ct. at 743; and second, the search must be permissible in scope, that is, "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." *Id.*[7]

This standard obviously can establish the law for certain factual situations. For example, if school rules disallow chewing gum on campus, would the Fourth Amendment permit a strip search by a male teacher of a young girl reasonably suspected of bubblegum possession? Plainly not. *See, e.g., Cornfield v. Consolidated High Sch. Dist. No. 230*, 991 F.2d 1316, 1320 (7th Cir. 1993) ("A nude search of a student by an administrator or teacher of the opposite sex would obviously violate [the *T.L.O.*] standard. Moreover, a highly intrusive search in response to a minor infraction would similarly not comport with

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[7]Given the case's history and its comprehensive test, I disagree with the conclusion, *ante* at 828, "that *T.L.O.* did not attempt to establish clearly the contours of a Fourth Amendment right as applied to the wide variety of school settings different from those involved in *T.L.O.*"

. . . *T.L.O.*"). Indeed, as the teachers' counsel conceded at oral argument, certain schoolhouse searches violate the Fourth Amendment as a matter of common sense. Thus, the question before our court, and incompletely answered by the majority, is whether the *T.L.O.* standard suggests "with obvious clarity," *Lanier*, --- U.S. at ----, 117 S. Ct. at 1227, that a strip search of schoolchildren for seven dollars is unconstitutional.

T.L.O., although not crystalline, is--simply on the facts of the case before us--a bright line. Herring and Sirmon lacked even arguable reasonable suspicion to strip search Jenkins and McKenzie.[8] The teachers offer the following evidence as creating reasonable suspicion to

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[8]My discussion is confined to the strip searches. I concede that the initial search of McKenzie's backpack was justified at its inception and reasonable in scope. Ashley Estell's report that Jenkins put the money in McKenzie's backpack gave reasonable suspicion to suspect that searching the backpack would turn up evidence of the theft. *See C.B. By and Through Breeding v. Driscoll*, 82 F.3d 383, 388 (11th Cir. 1996). Moreover, the backpack search, performed by the teacher and confined to the place identified as containing the contraband, was not excessive. Further, although the search of the students' shoes and socks may have been questionable, qualified immunity is appropriate, because *T.L.O.* does not clearly prohibit such a search. *See Wynn v. Board of Educ. of Vestavia Hills*, 508 So. 2d 1170 (Ala. 1987) (search of shoes and socks for $6 justified at inception where two students searched were only ones in room when theft occurred; concluding, without discussion, that search "was not excessively intrusive").

search: (1) several students implicated the plaintiffs and they accused one another; (2) McKenzie earlier had gone to the restroom; (3) the money was not found in the backpack or the students' shoes and socks; and (4) historically, other children had been caught with money in their apparel. All of these justifications are specious. First, Herring and Sirmon knew only of Ashley Estell's accusation[9] and the mutual finger-pointing by Jenkins, McKenzie, and Jamerson. Estell's testimony proved untrustworthy when the backpack search revealed nothing, leaving only the students' completely contradictory allegations. This testimony might be at the outer bounds of reasonable suspicion for one search, but it is not so for two.[10] Second, McKenzie's trip to the bathroom, although relevant to suspicion, was not communicated to

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[9]The majority's statement, *ante* at 822, that "[s]everal students subsequently implicated" the girls is misleading because it does not speak to Herring and Sirmon's knowledge. Fannin testified that two other students, Micquael Scales and Jennifer Simmons, accused Jenkins, but only after Fannin left Herring and Sirmon in the hall with the girls and Jamerson. Fannin did not relate this information until Sirmon returned to the classroom while Herring conducted the first strip search.

[10]Even though Jamerson had implicated himself as the thief (by stating that he hid the money behind a filing cabinet), the teachers conducted a second strip search of the two girls. This was wholly unreasonable, especially in view of the fact that Jenkins stated that she saw Jamerson open the victim's purse, the girls had never stolen anything before, and Jamerson had a history of theft.

Herring or Sirmon prior to the strip search.[11] Third, appellees' suggestion that the lack of evidence in the backpack or the students' shoes and socks permitted the strip search is dubious, as it rests on the questionable premise that more intrusive searches can be predicated upon prior unrevealing searches. *T.L.O.* makes clear that such bootstrapping is impermissible; there, the Court validated the escalating search only because additional evidence continued to emerge. See 469 U.S. at 347, 105 S. Ct. at 745-46 (discovery of rolling papers "justified further exploration of T.L.O.'s purse"; evidence of drug dealing justified expansion of search to separate zippered compartment; discovery of "list of people who owe me money" justified reading letters found in zippered compartment). Finally, there is no evidence that Herring or Sirmon knew about prior instances of other students

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[11]There is a conflict in the record on this point, so I presume in favor of the plaintiffs. Herring claimed that Fannin told her of McKenzie's trip and suggested to Herring that money might be hidden in McKenzie's clothes. Herring then allegedly replied that she would take the girls to the bathroom and have them check their clothes. Fannin contradicts this account. Herring claimed the interchange occurred while the girls were putting their shoes and socks back on, but Fannin said she left the hall at that point. Fannin also had no knowledge that Herring might take the girls to the bathroom, but presumed they would go to the office, in accordance with policy. Further, Herring's testimony is unreliable because she changed her story, telling Principal Nelson that Jamerson, not Fannin, informed her that McKenzie went to the bathroom.

concealing money in their clothing.[12] Thus, because arguable reasonable suspicion was missing, qualified immunity is inappropriate.[13]

In addition, the scope of the strip search far exceeded what *T.L.O.* allows. To evaluate the scope of a search, *T.L.O.* directs us to consider several factors: whether there was a reasonable relationship between the

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[12]Appellees point to clothing searches in other schools, and to searches of shoes and socks allegedly conducted by Nelson, but Herring and Sirmon were unaware of these incidents when they conducted the strip search. Further, it is not clear that, on summary judgment, we can assume that Nelson's searches ever occurred, as the Department of Education's Incident Report found that, in prior school theft incidents, no one had ever been required to remove any article of clothing.

[13]I believe that the majority errs by failing to consider whether there was reasonable suspicion to initiate each of the bathroom searches and by treating the searches as a single search justified at its inception. *Ante* at 827 n. 5. Each search was separate in time and place and several different people conducted them. For instance, the backpack search was performed solely by Fannin in her classroom, and was not revealed to Herring or Sirmon, who conducted the later bathroom searches. Further, I differ with the majority's apparent contention that *T.L.O.* requires only a one-time assessment of reasonable suspicion where searches are escalating in nature. *Id.* *T.L.O.* in fact commands a contrary conclusion--it condoned an escalating search only where discovered evidence created suspicion to look elsewhere.

means by which a student is searched and the objectives for that search; the intrusiveness of the search in light of the student's age and sex; and the intrusiveness of the search in light of the nature of the alleged infraction. Admittedly, age and sex are not particularly instructive in the present case.[14] Nevertheless, this does not render

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[14]Sex is irrelevant because the students were of the same gender as their searchers; however, the suggestion that *T.L.O.* is unclear because it does not explain "whether the search of a boy or girl is more or less reasonable," *ante* at 826, only confuses the issue. Gender is a concern, obviously, when searches are conducted by members of the opposite sex. As for age, the *T.L.O.* Court did not explain whether older or younger students can be searched more freely. *See Cornfield*, 991 F.2d at 1321 (discussing issue).

I cannot subscribe to the majority's view, *ante* at 827 n.5, that this search was reasonable in scope because eight-year-olds are prepubescent and frequently require assistance in the bathroom. Physical maturity is an elusive and, in my view, unworkable constitutional standard and is by no means the only consideration relevant to intrusiveness. *See generally* STEVEN F. SHATZ *et al.*, THE STRIP SEARCH OF CHILDREN AND THE FOURTH AMENDMENT, 26 U.S.F.L. REV. 1 (1991) (child's ability to consent, propensity to commit crime, and degree of body autonomy determine intrusiveness). Moreover, there is nothing in this record to support the majority's factual premises, and pediatric literature suggests that they are questionable. *See* MARCIA E. HERMAN-GIDDENS *et al.*, SECONDARY SEXUAL CHARACTERISTICS AND MENSES IN YOUNG GIRLS SEEN IN OFFICE PRACTICE: A STUDY

T.L.O. unclear for qualified immunity purposes. Our cases confirm that a balancing test may establish the law for a specific set of facts when the "balancing would lead to the inevitable conclusion that the [particular conduct] was unlawful." *Dartland v. Metropolitan Dade County*, 866 F.2d 1321, 1323 (11th Cir. 1989). Because the type of search employed here was not reasonably related to its objectives and was excessive in light of the nature of the infraction, the *T.L.O.* balance inevitably marks Herring and Sirmon's conduct as unconstitutional, thereby clearly establishing the law.[15]

The strip searches were not reasonably related to their objectives because they were excessively intrusive

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FROM THE PEDIATRIC RESEARCH OFFICE SETTINGS NETWORK, 99 PEDIATRICS 505 (1997) (noting that girls often develop pubertal characteristics by age 8, depending on racial and ethnic background); SALLY SQUIRES, BED-WETTING A COMMON INCONVENIENCE, WASH. POST, Apr. 8, 1997, at Z17 ("Most children are toilet-trained sufficiently to stay dry during the day by age 3 or 4. . . .").

[15]The majority notes that Justice Stevens objected to *T.L.O.*'s lack of clarity, *ante* at 827 n.5; he also realized, however, that its test would lead to some inescapable conclusions: "One thing is clear under any standard--the shocking strip searches that are described in some cases have no place in the schoolhouse. To the extent that deeply intrusive searches are ever reasonable outside the custodial context, it surely must only be to prevent imminent, and serious harm." 469 U.S. at 382 n. 25, 105 S. Ct. at 764 n. 25 (Stevens, J., concurring in part and dissenting in part) (emphasis added) (citations omitted).

and unlikely to turn up evidence, and because other reasonable, minimally intrusive options were available.

> It is axiomatic that a strip search represents a serious intrusion upon personal rights. In *Mary Beth G.* [*v. City of Chicago*, 723 F.2d 1263, 1272 (7th Cir. 1983)], the court referred to strip searches as "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission."

Justice v. City of Peachtree City, 961 F.2d 188, 192 (11th Cir. 1992).[16] Thus, for a strip search to be reasonably related in scope to the objectives for which it was undertaken, the objectives must be weighty,[17] and the

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[16]Although decided after the events at issue in the present case, Justice's treatment of strip searches merely confirms their self-evidently intrusive character.

[17]*See Cornfield*, 991 F.2d at 1321 ("[A]s the intrusiveness of the search of a student intensifies, so too does the standard of Fourth Amendment reasonableness. What may constitute reasonable suspicion for a search of a locker or even a pocket or pocketbook may fall well short of reasonableness for a nude search."). A sliding scale of reasonableness is inherent in the Fourth Amendment. *Terry*, for example, teaches that "[t]he scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." 392 U.S. at 19, 88 S. Ct. at 1878. *See also, e.g., United States v. McMurray*, 747 F.2d 1417, 1420 (11th Cir. 1984) (in customs context, as intrusiveness increases, suspicion

search must be necessary to locate the suspected evidence. *See Terry*, 392 U.S. at 29-30, 88 S. Ct. at 1883-85 (search must be "confined in scope to an intrusion reasonably designed to discover" items sought and "confined . . . strictly to what was minimally necessary" to locate those items). Here, acting only on the discredited testimony of one student and the contradictory allegations of the three suspects (exacerbated by threats that the police would be called to investigate), the teachers launched a full-scale strip search of two eight-year-olds, foregoing several reasonable, yet minimally intrusive, intermediate steps.

Fannin never questioned whether the money was truly stolen. She did not inquire whether the money might have been spent or misplaced, nor did she ask how Estell knew that Jenkins took the money. Fannin also did not search Jenkins's bag. Further, Herring took over the situation without asking any questions, and promptly ordered a search of the students' shoes and socks, followed by a strip search, even though there was absolutely no evidence that the girls might have the money in their underclothing. Thus, because there was not even reasonable suspicion to believe that the girls possessed contraband, because the teachers ignored less intrusive means, and because the personal invasion was extreme, the first strip search was necessarily disproportionate to its justification. The second strip search was even more blatantly unconstitutional, as no one could reasonably argue that it was necessary after the fruitless prior search.

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necessary to justify search must increase).

Finally, the nature of the infraction here--a small theft--is insufficient as a matter of law to permit a strip search. *T.L.O.* directs us to consider the nature of the infraction because, although keeping order in the school is important, it is not determinative. Students' privacy rights must be weighed in the balance. Strip searching a student is permissible only in extraordinary cases, and only to prevent imminent harm.[18] For example, if school administrators have reasonable suspicion that a student is carrying a gun on his/her person and a "pat-down" confirms this suspicion, a strip search by an administrator of the same sex, strictly limited to finding the weapon, would be permissible. The theft of $7, although morally reprehensible, poses no threat of physical danger to other students and cannot, therefore, serve as the basis for a search of this magnitude.[19]

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[18]*See Justice*, 961 F.2d at 193 (collecting cases; noting that threat of harm was only permissible reason in case law for strip search of arrestee).

[19]*See, e.g., Oliver by Hines v. McClung*, 919 F. Supp. 1206, 1216-19 (N.D. Ind. 1995) (strip search of seventh graders for $4.50 unconstitutionally unreasonable); *State ex rel. Galford v. Mark Anthony B.*, 189 W. Va. 538, 433 S.E.2d 41, 49 (1993) (strip search for $100 unconstitutionally unreasonable in scope because no threat of danger); *Bellnier v. Lund*, 438 F. Supp. 47, 53-54 (N.D.N.Y. 1977) (strip search for stolen $3 unconstitutionally unreasonable, given unparticularized suspicion and "relatively slight danger of the conduct involved").

As the Seventh Circuit, faced with a qualified immunity defense following a school strip search, explained:

> It does not require a constitutional scholar to conclude that a nude search of a thirteen-year-old child is an invasion of constitutional rights of some magnitude. More than that: it is a violation of any known principle of human decency. Apart from any constitutional readings and rulings, simple common sense would indicate that the conduct of the school officials in permitting such a nude search was not only unlawful but outrageous under "settled indisputable principles of law."

Doe v. Renfrow, 631 F.2d 91, 92-93 (7th Cir. 1980) (citation omitted), *cert. denied*, 451 U.S. 1022, 101 S. Ct. 3015, 69 L. Ed. 2d 395 (1981). Because Herring and Sirmon flagrantly ignored common sense and, crucially, the Constitution, I would reverse the district court's order granting qualified immunity.

Opinion of the Court of Appeals Panel
(vacated by grant of rehearing *en banc*)

(September 23, 1996)

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Devarieste Curry, Beveridge & Diamond, Washington, DC, for appellants.

Donald B. Sweeney, Jr., Valerie Theresa Kisor, Rives & Peterson, Birmingham, AL, for appellees.

Appeal from the United States District Court for the Northern District of Alabama.

Before KRAVITCH and BIRCH, Circuit Judges, and SCHWARZER,* Senior District Judge.

KRAVITCH, Circuit Judge:

This action was brought on behalf of two elementary school students who allegedly were strip searched by a teacher and guidance counselor after having been accused of stealing money from a classmate. The district court concluded that defendants were entitled to summary judgment on all claims. In particular, the court granted the individual defendants summary judgment on plaintiffs' § 1983 Fourth Amendment claims. We affirm all of the district court's summary judgment orders, except

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*Honorable William W. Schwarzer, Senior U.S. District Judge for the Northern District of California, sitting by designation.

for the grant of qualified immunity to defendants on the Fourth Amendment claims, which we reverse.

I.

In 1992, Cassandra Jenkins and Onieka McKenzie were eight-year-old second graders at Graham Elementary School in Talladega, Alabama. On the afternoon of May 1, one of Cassandra's and Onieka's classmates told their teacher, Hilda Fannin, that $7 was missing from her purse. Another classmate told Fannin that Cassandra had taken the money and stashed it in Onieka's backpack. After searching the backpack and finding no money, Fannin questioned Cassandra and Onieka in the hallway outside the classroom. The girls accused each other, as well as a male classmate, Anthony Jemison, of the theft.

As Fannin's questioning of Cassandra, Onieka, and Anthony continued in the hallway, the school music teacher, Susannah Herring, approached. Upon being informed of the theft accusation, Herring took charge of the investigation. First, she instructed the three students to take off their shoes and socks. No money was revealed. Herring then summoned Melba Sirmon, a guidance counselor whose office was nearby. Herring and Sirmon took Cassandra and Onieka to the girls' restroom.

Inside the restroom, Herring told Cassandra and Onieka to "check" their clothes for the money. According to Cassandra, Herring ordered them to go inside the stalls and come back out with their underpants down to their

ankles.[1] As Cassandra and Onieka entered separate stalls and locked the doors, Sirmon left the restroom to check on Anthony, who was waiting outside. Shortly after she returned, according to Cassandra, Cassandra and Onieka emerged from the stalls with their underpants pulled down to their ankles. Herring asked them if they had found the money, and they replied that they had not. Sirmon allowed them to return to their stalls and pull their underpants back up.[2]

Herring and Sirmon then escorted Cassandra, Onieka, and Anthony to the office of the school principal, Crawford Nelson. After hearing Herring's account of what had happened,[3] Nelson interrogated the three children about the location of the stolen cash. Anthony claimed that the money was hidden behind a file cabinet and then, when nothing was found there, that it was stashed in a locker. Nelson concluded that Anthony had no idea where the money was and dismissed him.

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[1]Herring claims that she merely told Cassandra and Onieka to "check" their clothes, not to remove them.

[2]Onieka testified that she and Cassandra pulled their underpants down and back up while inside the locked stalls and that neither came out of the stalls with her underpants down.

[3]Although Herring apparently did not inform Nelson that Cassandra and Onieka had removed their clothes in the restroom, Nelson testified that he expressed disapproval of her forcing the girls to remove their shoes and socks.

From Nelson's office, Herring and Sirmon took Cassandra and Onieka back to the restroom.[4] Inside, Herring ordered the two girls to take off their dresses, which they did. Cassandra was wearing a slip; Onieka was wearing only underpants. Herring then instructed them to shake their dresses, and she shook the slip Cassandra was wearing. After nothing was found, Cassandra and Onieka were allowed to put their dresses back on. This account was corroborated by a witness. Joyce Merritt Shears, the parent of another student, was walking in the hallway past the girls' restroom while Cassandra and Onieka were being searched. Shears heard children crying and an adult say either "remove your slip" or "hold up your slip." Entering the restroom to investigate, Shears saw Cassandra and Onieka, "one in their panties and the other one in their slip."

The Talladega City Board of Education ("Board") conducted an investigation of the strip search. After a hearing, the Board concluded that Herring had committed a "gross error in judgment" regarding the manner in which she investigated the alleged theft; that Sirmon had erred in her judgment by assisting Herring, failing to notify the principal immediately, and not calling Cassandra's and Onieka's parents; and that Nelson had erred in his judgment by not calling the girls' parents and failing to establish a uniform policy for dealing with theft in the

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[4]Herring and Sirmon assert that they only took Cassandra and Onieka to the restroom once, before they met with Nelson; thus, they dispute the girls' description of the second restroom incident in its entirety. There is no evidence that Nelson authorized or was aware of a second restroom trip.

school. Despite the superintendent's recommendation that Herring be fired, the Board did not impose any serious sanctions.

Plaintiffs, on behalf of Cassandra and Onieka, filed a complaint against the Board and nine individual defendants (including Nelson, Herring, and Sirmon) in 1994, alleging, pursuant to 42 U.S.C. § 1983, that they had been strip searched in violation of the Fourth Amendment, Title VI of the Civil Rights Act of 1964, and Title IX of the Education Amendments of 1972,[5] and also alleging violations of Alabama tort law. The district court initially dismissed all claims for money damages against all defendants, except for those against Herring and Sirmon in their individual capacities and those against the Board. Then, on its own initiative, the court entered an order stating that it was reconsidering whether Herring and Sirmon were entitled to qualified immunity for the allegedly unconstitutional search in light of recent Eleventh Circuit decisions. The court proceeded to grant

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[5]Cassandra and Onieka, who are black, claim that the searches conducted by Herring and Sirmon, who are white, were discriminatory based on race and gender. With respect to gender, plaintiffs observe that Anthony Jemison was not strip searched despite also being accused of the theft. With respect to race, they point to other searches in Talladega schools that, they allege, demonstrate a correlation between the intrusiveness of the searches and the race of the students searched. After carefully reviewing the record, we agree with the district court that the plaintiffs have failed to present sufficient evidence of discrimination based on gender or race to survive the summary judgment motion.

summary judgment on the basis of qualified immunity in favor of the individual defendants on the Fourth Amendment claim. In addition, the court granted summary judgment for all defendants on the Title VI and Title IX claims, finding no substantial evidence of discrimination based on race or gender; for the Board on the § 1983 Fourth Amendment claim, finding no basis for municipal liability; for all defendants on the claims for injunctive and declaratory relief, finding that the plaintiffs lacked standing to bring these claims; and for individual defendants on the state law claims, finding that the defendants were entitled to qualified immunity under Article I, § 14 of the Alabama Constitution. Plaintiffs now appeal.

II.

We affirm the grant of summary judgment for all defendants on the Title VI and Title IX claims, for the Board on the Fourth Amendment § 1983 claim, for all defendants on the claims for injunctive and declaratory relief, and for the individual defendants on the state law claims.[6] This leaves the issue of § 1983 qualified immunity for the individual defendants on plaintiffs' Fourth Amendment claims.

The district court granted Herring and Sirmon qualified immunity, concluding that Fourth Amendment

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[6]Although we do not adopt the district court's thorough memorandum opinions on these issues as part of the opinion of this court, we generally find the court's analysis cogent and persuasive. Plaintiffs' contentions on appeal regarding these issues lack merit.

law was not "clearly established" as applied to their conduct.[7] We reverse the district court's decision because Fourth Amendment law was sufficiently clear in 1992 that there could be no doubt that Herring's and Sirmon's actions (construing the evidence and all reasonable inferences therefrom in the light most favorable to the plaintiffs at the summary judgment stage) were unconstitutional.

III.

Before reaching the merits, we wish to clarify some general qualified immunity issues that seem to have confused the district court and defendants in this case.

The Supreme Court's qualified immunity doctrine attempts to strike a balance between two competing concerns: the necessity for constitutional damages actions against public officials because such actions "may offer the only realistic avenue for vindication of constitutional

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[7]The district court also granted qualified immunity to Nelson. On appeal, plaintiffs seem to argue that Nelson should be stripped of immunity because he violated clearly established law by failing to train teachers in proper search methods. This argument confuses individual liability for a constitutional violation with municipal liability under § 1983. Plaintiffs do not appear to claim that Nelson's alleged failure to train teachers amounts to an independent constitutional violation for which he could potentially be held liable in his individual capacity. Thus, the issue of qualified immunity should not even arise with respect to Nelson. We affirm the district court's grant of summary judgment in favor of Nelson.

guarantees" and the need to limit the costs to individuals and society created by litigation against public officials--including diversion of official energies from pressing public issues, deterrence of able citizens from acceptance of public office, and "the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'" *Harlow v. Fitzgerald*, 457 U.S. 800, 814, 102 S. Ct. 2727, 2736, 73 L. Ed. 2d 396 (1982) (quoting *Gregoire v. Biddle*, 177 F.2d 579, 582 (2d Cir. 1949), *cert. denied*, 339 U.S. 949, 70 S. Ct. 803, 94 L. Ed. 1363 (1950)).

In its effort to strike the optimal balance, the Supreme Court in *Harlow v. Fitzgerald* established an objective test for qualified immunity: government officials performing discretionary functions are immune from § 1983 liability for monetary damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. 800, 817-19, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982). In *Anderson v. Creighton*, the Court explained when a right is "clearly established":

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

483 U.S. 635, 640, 107 S. Ct. 3034, 3039, 97 L. Ed. 2d 523 (1987) (citations omitted).

These standards allow us to filter out the most culpable or least competent public officials and make them liable for damages, thereby striking the balance sought in *Harlow* by permitting the vast majority of government to operate free from panoptic judicial oversight or constitutional job descriptions while still retaining a viable avenue for vindication of constitutional guarantees.

Since *Anderson*, this court has devoted much effort to staking out an operational standard somewhere between the *Anderson* Court's polar extremes: "in light of pre-existing law the unlawfulness must be apparent," but "the very action in question [need not have] previously been held unlawful." Over-emphasizing either of the *Anderson* poles flouts the Supreme Court's efforts to construct a meaningful doctrine of qualified immunity. To treat each set of facts as unique and legally indeterminate would make qualified immunity absolute by denying that any unlawful conduct violates rights that were "clearly established." At the other extreme, relying on abstract, highly general formulations of rights would effectively abrogate immunity by declaring every violated right "clearly established." After *Anderson*, then, this court has sought a stable equilibrium between these opposing pressures.

Although there is no doubt that qualified immunity law in this circuit has evolved in its application to some extent in the direction of more protection for government officials, this has simply been the result of implementing the *Anderson* Court's clarification of the appropriate level of generality at which a right must be "clearly established" for purposes of qualified immunity. *See Lassiter v. Alabama A & M Univ.*, 28 F.3d 1146, 1150 (11th Cir.

1994) (*en banc*) ("The most common error we encounter . . . occurs on this point: courts must not permit plaintiffs to discharge their burden by referring to general rules and to the violation of abstract 'rights.' ") (citing *Anderson*, 483 U.S. at 637-41, 107 S. Ct. at 3038-39).

Some of our efforts, however, have been misinterpreted as a sea change in qualified immunity. For instance, the district court in this case originally concluded that Sirmon's and Herring's actions did violate clearly established Fourth Amendment law, but it felt obligated to reconsider *sua sponte* based on its reading of some recent Eleventh Circuit qualified immunity cases. *See, e.g., Lassiter*, 28 F.3d 1146.[8]

Notwithstanding *Lassiter*'s admonition that the court was announcing no "[n]ew rules," but merely "for emphasis . . . restat[ing] principles which do govern qualified immunity cases," 28 F.3d at 1149, that opinion has been misconstrued as announcing a sweeping change. For instance, the statement in *Lassiter* that "[f]or qualified immunity to be surrendered, pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law in the circumstances," *Lassiter*, 28 F.3d at 1150, has been read by some to indicate that qualified immunity is due every official unless this court has

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[8]In addition to *Lassiter*, the district court cited *Spivey v. Elliott*, 41 F.3d 1497 (11th Cir. 1995); *Belcher v. City of Foley*, 30 F.3d 1390 (11th Cir. 1994); and *Post v. City of Ft. Lauderdale*, 7 F.3d 1552 (11th Cir. 1993), *modified*, 14 F.3d 583 (11th Cir. 1994).

addressed essentially identical facts in a previous case. But *Lassiter* merely rephrases the *Anderson* standard, "in the light of pre-existing law the unlawfulness must be apparent." *Lassiter* does not abrogate *Anderson*'s recognition that "the very action in question [need not have] previously been held unlawful" nor could it have.

Likewise, other cases have been misconstrued. We can all agree that "[i]f case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant," *Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1557 (11th Cir. 1993), *modified*, 14 F.3d 583 (11th Cir. 1994). This is another restatement of the Anderson requirement that the law must be apparent, but it does not answer the question "how bright?" or define the set of cases gestured towards by "almost." In other words, these recent cases have not eviscerated *Anderson*'s recognition that "the very action in question [need not have] previously been held unlawful." Thus, the basic principles of qualified immunity doctrine remain unchanged.

The confusion over qualified immunity is exemplified by defendants' apparent assumption that relevant law can be "clearly established" only when there exist cases with facts materially similar to those of the case at hand, as evidenced by their insistence that qualified immunity is due here because this court has never addressed a factually similar case. This argument is false in at least two circumstances: those in which the official misconduct is more egregious than conduct of the same general type that has been deemed illegal in other

cases[9] and those rare cases in which application of the legal standard would necessarily lead reasonable officials in the defendant's situation to but one inevitable conclusion. It is the latter we are most interested in here.

Lassiter explicitly left "open the possibility that occasionally the words of a federal statute or federal constitutional provision will be specific enough to

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[9]*See Dolihite v. Maughon*, 74 F.3d 1027, 1048 (11th Cir. 1996) (examining the facts to determine whether or not the act alleged in that case was "as egregious as [previous] cases, or more so").

> In other words, if cases make clear that conduct *x* is constitutionally or statutorily forbidden, then the law is certainly "clearly established" with respect to conduct *y* if *y* is worse than *x* relative to the reason *x* is unconstitutional or otherwise illegal. And this is so even if--or especially if--the facts of *y* differ considerably from the facts of *x*: It begins to seem as if to survive a motion to dismiss a suit on grounds of immunity the plaintiff must be able to point to a previous case that differs only trivially from his case. But this cannot be right. The easiest cases don't even arise. There has never been a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages liability because no previous case had found liability in those circumstances.

K.H. v. Morgan, 914 F.2d 846, 851 (7th Cir. 1990).

establish the law applicable to particular circumstances clearly and to overcome qualified immunity even in the absence of case law." *Lassiter*, 28 F.3d at 1150 n. 4. It, of course, follows that if a federal statute or federal constitutional provision can clearly establish the law in the absence of case law, the Supreme Court's pronouncement of a constitutional test could also be specific enough to do so.

That the law can be clearly established where the application of a constitutional standard leads to an inevitable conclusion that the acts are unconstitutional should be obvious given the purposes of qualified immunity. If a government official with even the most rudimentary, not to say reasonable, understanding of relevant law would have no doubt that his conduct was unconstitutional or otherwise illegal, then it would be perverse to immunize him from liability simply because his behavior was more egregious than any on record or because this court never before faced a similar set of facts.

Our circuit recently applied this very reasoning. In *McMillian v. Johnson*, 88 F.3d 1554 (11th Cir. 1996), the plaintiff contended that, by placing him on deathrow while he awaited trial, local officials had violated his due process right to be free from punishment as a pretrial detainee. The lack of cases with materially similar facts did not preclude the *McMillian* court from denying summary judgment to the defendants on qualified immunity grounds. The court found that the Supreme Court's constitutional directive as set forth in *Bell v. Wolfish*, 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979)--that officials cannot impose conditions on pretrial detainees with an intent to punish--would have put any

reasonable official on notice that the acts alleged in McMillian violated clearly established law:

> [F]or the law to be clearly established, a court need not have found the very action in question unlawful; what is essential is that the action's unlawfulness be apparent in light of pre-existing law. *Jordan* [*v. Doe*], 38 F.3d [1559,] 1566 [(11th Cir. 1994)]. We do not view the absence of a case factually similar to the extraordinary allegations in this case as an indication that the law was not clearly established that confining a pretrial detainee on death row to punish him is unconstitutional. *Bell*'s prohibition on any pretrial punishment, defined to include conditions imposed with an intent to punish, should have made it obvious to all reasonable officials in [defendants'] place that holding [plaintiff] on death row to punish him before he was tried violated [his] due process rights.

McMillian, 88 F.3d at 1565 (emphasis added). Thus, *McMillian* held that, at least for purposes of the case before it, the *Bell* rule clearly established the law.

Defendants next argue that even if a constitutional standard might clearly establish the law in some circumstances, the relevant law can virtually never be clearly established by cases that employ balancing tests. (*New Jersey v. T.L.O.*, 469 U.S. 325, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985), the case governing application of the Fourth Amendment to school searches, uses a balancing test.) The premise appears to be that balancing tests, by their nature, do not stake out a bright enough line to put

public officials on notice of when their conduct violates a constitutional right.

The defendants' premise is flawed. It is indisputable that cases applying the balancing test may well make its application to allegedly unconstitutional conduct entirely determinate.[10] Thus, there never has been any doubt that public officials can be stripped of qualified immunity when, for instance, they conduct a warrantless search that could not reasonably be thought supported by probable cause or exigent circumstances.[11]

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[10]As *Lassiter* reiterated:

> "If case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant." *Post v. City of Ft. Lauderdale*, 7 F.3d 1552, 1557 (11th Cir. 1993), *modified*, 14 F.3d 583 (11th Cir. 1994); *accord Kelly v. Curtis*, 21 F.3d 1544, 1554 (11th Cir. 1994). "The line is not to be found in abstractions--to act reasonably, to act with probable cause, and so forth--but in studying how these abstractions have been applied in concrete circumstances." *Barts* [*v. Joyner*], 865 F.2d [1187,] 1194 [(11th Cir. 1989), *cert. denied*, 493 U.S. 831, 110 S. Ct. 101, 107 L. Ed. 2d 65 (1989)].

Lassiter, 28 F.3d at 1150.

[11]*See, e.g.*, *Anderson*, 483 U.S. at 635, 107 S. Ct. at 3034 (assuming this to be true while emphasizing that the converse is also true); *Williamson v. Mills*, 65 F.3d 155, 157-58 (11th Cir. 1995) (no qualified immunity for police

And, although it is true that the mere statement of a balancing test (or other flexible legal standard) will usually be insufficient to determine whether particular conduct is clearly illegal, such a test, like other legal standards or statutes, may be sufficient to clearly establish the law in some, albeit rare, circumstances. *See Oladeinde v. City of Birmingham*, 963 F.2d 1481, 1487 (11th Cir. 1992) (concluding, without citing a materially similar case, that application of the balancing test in that case would lead to the "inevitable conclusion" that defendants violated the Constitution) (Edmondson, J.), *cert. denied*, 507 U.S. 987, 113 S. Ct. 1586, 123 L. Ed. 2d 153 (1993).

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officer on Fourth Amendment false arrest claim where "pre-existing law compels the conclusion" that officer lacked "even arguable probable cause"); *Hartsfield v. Lemacks*, 50 F.3d 950, 955 (11th Cir. 1995) (no qualified immunity for police officer who failed to make reasonable effort to identify residence to be searched where "all reasonable police officers should have known" that this violated the law); *Swint v. City of Wadley*, 51 F.3d 988, 996-1000 (11th Cir. 1995) (no qualified immunity for police officers who conducted warrantless searches and seizures without, in light of the facts of analogous Fourth Amendment cases, "even arguable probable cause"); *Von Stein v. Brescher*, 904 F.2d 572, 579 (11th Cir. 1990) ("[A]pplying the qualified immunity test in the context of Plaintiff's alleged unlawful arrest, we must determine whether reasonable officers in the same circumstances and possessing the same knowledge as the Defendants could have believed that probable cause existed to arrest Plaintiff. . . .").

It is, therefore, misleading to speak of a separate category of cases in which there is no "bright-line" rule that "puts the reasonable public [official] on notice of a constitutional violation," but in which the official is nonetheless not entitled to qualified immunity when application of a balancing test "would lead to the inevitable conclusion" that the official's conduct was unconstitutional. *Dartland v. Metropolitan Dade County*, 866 F.2d 1321, 1323 (11th Cir. 1989) (acknowledging a balancing test will lead to the inevitable conclusion that a defendant's conduct violated clearly established law in some cases). If the facts of other cases applying the balancing test or the test itself leads to such an "inevitable conclusion," then the "bright-line" has been drawn.

IV.

The qualified immunity question presented by this case is whether Fourth Amendment law "clearly established" that the search of Cassandra and Onieka conducted by Herring and Sirmon was unconstitutional.[12] The application of the Fourth Amendment to searches of

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[12]*Harlow* requires that the defendant official prove that "he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred," before the burden of proof shifts to the plaintiff to demonstrate that the defendant violated clearly established law. *Zeigler v. Jackson*, 716 F.2d 847, 849 (11th Cir. 1983). Plaintiffs in this case concede that Herring and Sirmon were acting within the scope of their discretionary authority at the time of the search.

public school students is[13] governed by *New Jersey v. T.L.O.*, 469 U.S. 325, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985). T.L.O., a 14-year-old high school student, was spotted by a teacher smoking in the bathroom. When questioned by a school administrator, T.L.O. denied smoking in the bathroom and claimed that she did not smoke at all. The administrator demanded and opened T.L.O.'s purse, discovering a pack of cigarettes. Reaching into the purse for the cigarettes, the administrator noticed a package of rolling papers. The administrator, suspecting that further evidence of drug use might be found, proceeded to search the purse thoroughly, revealing marijuana and various implements of dealing the drug. 469 U.S. at 325-36, 105 S. Ct. at 735-36.

After deciding that the Fourth Amendment applies to searches of public school students, the Court held that the search of T.L.O.'s purse was not unreasonable. Balancing "the child's interest in privacy" against "the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds," *id.* at 338-39, 105 S. Ct. at 741, the Court concluded that the reasonableness of a school search was determined by a two-part inquiry--whether it was (1) justified at its inception and (2) permissible in scope--with no requirement of probable cause. *Id.* at 339-43, 105 S. Ct. at 742-43. In particular, the Court specified the following standards:

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[13]Although we use the present tense here, our analysis of the relevant law is historical: we are interested in the state of the law at the time of the alleged unconstitutional conduct, May 1, 1992.

> Under ordinary circumstances, a search of a student by a teacher or other school official will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.

Id. at 341-42, 105 S. Ct. at 743.

We apply these precepts to the case at hand. In doing so, we note that this circuit, before May 1, 1992, had not had the opportunity to apply *T.L.O.*'s standards in factually similar circumstances. The lack of Eleventh Circuit case law does not, however, preclude us from determining whether the Supreme Court's directive itself would have led reasonable school officials to the inevitable conclusion that their behavior violated the Constitution.

We will assume that the searches of Cassandra and Onieka in this case comprised a single, step-by-step search that was justified at its inception.[14] For the purposes of

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[14]Alternatively, we could conceptualize what occurred as a series of separate searches, each requiring independent justification at its inception. *Cf. T.L.O.*, 469 U.S. at 341-49, 105 S. Ct. at 743-46 (Court treated the initial investigation of T.L.O.'s purse for cigarettes and the continued investigation after rolling papers were

this case, we will assume that their classmate's accusation may have provided "reasonable grounds" for searching Onieka's backpack and, perhaps, even for requiring the children to remove their shoes and socks. We will also assume that these first stages of the overall search were reasonable in scope. It is the following stages, the restroom searches, and their expansion in scope that create the glaring problem.

Under *T.L.O.*, the two restroom searches in which Cassandra and Onieka were required to undress were unconstitutional unless they were "'reasonably related in scope to the circumstances which justified the interference in the first place.'" *T.L.O.*, 469 U.S. at 341, 105 S. Ct. at 743 (quoting *Terry v. Ohio*, 392 U.S. 1, 20, 88 S. Ct. 1868, 1879, 20 L. Ed. 2d 889 (1968)). More specifically, in order for the scope of these searches to be permissible, "the measures adopted" must have been "reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." *Id.* at 342, 105 S. Ct. at 743.

Thus, *T.L.O.* requires us to consider several factors in determining whether the scope was permissible: whether there was a reasonable relationship between the

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spotted as separate searches, concluding that each was justified at its inception). As indicated by our discussion later in the text where we address whether the search was reasonable in scope, the two restroom searches probably were not justified at their inceptions. We choose not to rest our holding on this inquiry, however, because the more blatant injustice in this case is the ultimate scope of the search conducted by Herring and Sirmon.

scope of the search (the measures adopted) and the objectives of the search; the intrusiveness of the search in light of the age and sex of the student; and the intrusiveness of the search in light of the nature of the infraction.

To determine whether the scope of a search is reasonably related to its objectives, we must examine the measures adopted here. Strip searches are among the most intrusive of searches.[15] This fact is self-evident. As this court, in the course of its most thorough consideration of the constitutionality of strip searching minors, has recognized: "It is axiomatic that a strip search represents a serious intrusion upon personal rights. In *Mary Beth G.* [*v. City of Chicago*, 723 F.2d 1263, 1272 (7th Cir. 1983)], the court referred to strip searches as 'demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission.' " *Justice v. City of Peachtree City*, 961 F.2d 188, 192 (11th Cir. 1992).[16] Moreover, the

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[15]We recognize that some types of strip searches, such as body cavity searches, are even more intrusive than the search conducted in this case. We also note that a strip search performed by someone of a different gender from the person searched will be considered significantly more intrusive than a same-sex search.

[16]*Justice* was decided a few days after the events at issue here and, therefore, does not clearly establish the law in this case for qualified immunity purposes. We cite the case not as an illustration of clearly established law but as evidence that the point at issue here--that strip searches are inherently among the most intrusive of

perceived invasiveness and physical intimidation intrinsic to strip searches may be exacerbated for children. *See Justice*, 961 F.2d at 192 ("[c]hildren are especially susceptible to possible traumas from strip searches") (internal quotation marks omitted). Consequently, for the extreme invasion of privacy inflicted by a strip search to be "reasonably related to the objectives of the search," these objectives must carry tremendous weight.[17]

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searches--is self-evident, as the *Justice* court itself concluded.

[17]*See Cornfield v. Consolidated High Sch. Dist. No. 230*, 991 F.2d 1316, 1321 (7th Cir. 1993) ("[A]s the intrusiveness of the search of a student intensifies, so too does the standard of Fourth Amendment reasonableness. What may constitute reasonable suspicion for a search of a locker or even a pocket or pocketbook may fall well short of reasonableness for a nude search.").

T.L.O.'s sliding scale for reasonableness determinations is an inherent part of Fourth Amendment jurisprudence in those cases, like *T.L.O.*, where, although probable cause is not required, a "reasonableness" standard still applies. *T.L.O.*, 469 U.S. at 341, 105 S. Ct. at 742-43, cites *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). *Terry* teaches that "[t]he scope of the search must be strictly tied to and justified by the circumstances which rendered its initiation permissible." 392 U.S. at 19, 88 S. Ct. at 1878 (citations and internal quotation marks omitted). *See also, e.g., United States v. McMurray*, 747 F.2d 1417, 1420 (11th Cir. 1984) (requiring, in the customs context, that as intrusiveness in-

We next look at the objectives of the search and whether they were reasonably related to the methods chosen, i.e., whether the search was "'reasonably related in scope to the circumstances which justified the interference in the first place.'" *T.L.O.*, 469 U.S. at 341, 105 S. Ct. at 743 (quoting *Terry v. Ohio*, 392 U.S. 1, 20, 88 S. Ct. 1868, 1879, 20 L. Ed. 2d 889 (1968)).[18] In applying this rule in *Terry*, the Court determined whether the search was "confined in scope to an intrusion reasonably designed to discover" the items sought and "confined . . . strictly to what was minimally necessary" to locate those items. *Terry*, 392 U.S. at 29-30, 88 S. Ct. at 1884-85.

We must decide, therefore, whether the extreme intrusiveness involved in the strip searches here was "reasonably related" to the objective of discovering the allegedly stolen cash. Because the possibility of finding the cash in the two restroom searches was slight (at best), we conclude that the extreme measures adopted here

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creases, the amount of suspicion necessary to justify the search must correspondingly increase).

[18]This standard also suggests that we look to the seriousness of the offense or the danger the search seeks to prevent to determine whether the methods were reasonably related to the objectives of the search. For clarity's sake, we have confined these considerations to that part of our opinion discussing *T.L.O.*'s requirement that the search not be "excessively intrusive in light of the . . . nature of the infraction." 469 U.S. at 342, 105 S. Ct. at 743. See discussion *infra* and note 20.

were not reasonably related to the objectives of the search.

A second-grader reported $7 missing. Her teacher never asked her whether she might have lost the money or forgotten that she spent it. Fannin simply asked another student whether she knew anything about the missing money. That student reported that Cassandra had taken the money and put it in Onieka's backpack. Fannin never asked that student how she knew, whether she had seen the event, or, if not, who told her about it. And there is no evidence that Onieka or Cassandra had stolen anything before. The failure to locate the money in Onieka's backpack, where it was reportedly stashed, casts further doubt on the reliability of the informant's story and, thus, the justification for the investigation. Furthermore, Fannin did not check Cassandra's bag or any other area of the room before handing the investigation over to Herring.

When Herring accepted responsibility for the investigation, she did not ask Fannin about any of the details, including who had originally accused the girls or how the accuser knew the girls had taken the money. All she knew was that the girls had been accused of taking $7 and that they, in turn, accused each other and Anthony Jemison of stealing the cash. With only this evidence in hand and without seeking any specifics from the children about the theft, she made the girls and Anthony remove their shoes and socks.[19] When the money was not found

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[19]It is at least questionable whether Herring had reasonable grounds for requiring Cassandra and Onieka to remove their shoes and socks.

there, she proceeded, with Sirmon, to take the girls to the restroom to search them even though no one had reported that either of the girls had hidden the money in her underclothing and there was no evidence that the girls had ever hidden money or contraband in their clothing before. The entire restroom search was apparently premised on the fact that one of the girls had been to the restroom before the money was reported missing. If this were the reason for concluding the money was hidden in one of the girl's underclothing, Sirmon and Herring might have had arguable, albeit slight, grounds for believing that a first search of that girl's underclothing would lead to evidence of the theft. There were no grounds, however, for taking both girls to the restroom.

After finding nothing in the girls' underpants during the first search, Sirmon and Herring took them to the restroom a second time. If the method chosen in the first restroom search was highly unlikely to lead to evidence, then requiring the girls to undress a second time was completely unlikely to end in discovery of the cash. Having looked in the girls' underpants, the probability that the money could have been hidden anywhere else on the children's persons (especially after a walk to and from the principal's office) was almost nil. Thus, even at this stage of the inquiry it is difficult to believe that any reasonable school official could surmise that it was constitutionally permissible to conduct these two highly intrusive searches where there was such a negligible possibility that any evidence of the infraction would be found. *T.L.O.*, however, gives us further guidance.

Under *T.L.O.*, the nature of the infraction is another factor to be weighed in determining the permissible intrusiveness or scope of a search. One can

imagine the range of possible school-place infractions as a spectrum with the most serious infractions falling at one end. While reasonable school officials would disagree about exactly where the infraction at issue here might fall along the spectrum, the following generalizations are certain. It is obvious that an infraction that presents an imminent threat of serious harm--for example, possession of weapons or other dangerous contraband--would be the most serious infractions in the school context.[20] Thus,

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[20]In fact, strip searches are probably only permissible in the school setting, if permissible at all, where there is a threat of imminent, serious harm. Writing separately in *T.L.O.*, Justice Stevens made clear that the point of the majority's Fourth Amendment standard was to avoid litigation over the routine, limited searches necessary to maintain school discipline, while "prohibit[ing] obviously unreasonable intrusions of young adults' privacy." 469 U.S. at 381, 105 S. Ct. at 764. To illustrate the type of egregious school search that would noncontroversially violate the Fourth Amendment, Justice Stevens gave this example:

> One thing is clear under any standard--the shocking strip searches that are described in some cases have no place in the schoolhouse. *See Doe v. Renfrow*, 631 F.2d 91, 92-93 (CA7 1980) ("It does not require a constitutional scholar to conclude that a nude search of a 13-year-old child is an invasion of constitutional rights of some magnitude"), *cert. denied*, 451 U.S. 1022, 101 S. Ct. 3015, 69 L. Ed. 2d 395 (1981); *Bellnier v. Lund*, 438 F. Supp. 47 (NDNY 1977); *People v. D.*, 34 N.Y.2d 483, 358 N.Y.S.2d 403, 315 N.E.2d 466

> (1974); *M.J. v. State*, 399 So. 2d 996 (Fla. App. 1981). To the extent that deeply intrusive searches are ever reasonable outside the custodial context, it surely must only be to prevent imminent, and serious harm.

Id. at 382 n. 25, 105 S. Ct. at 764 n.25 (Stevens, J., concurring in part and dissenting in part).

Eleventh Circuit caselaw confirms Justice Stevens's understanding of the *T.L.O.* standard. Although no case involving a student strip search had been presented to this court before the incidents in this case occurred, less than two weeks after this case was decided, we took the opportunity to express our view of such searches. In *Justice*, this court held that law enforcement officials may subject a juvenile who is lawfully in custody to a limited strip search based upon reasonable suspicion that he or she is concealing a weapon or drugs. 961 F.2d at 193. In reaching this conclusion, however, the *Justice* court was careful to emphasize the limited scope of its holding and to distinguish other situations in which a strip search would be unconstitutional. Because the strip search in *Justice* was performed by law enforcement officers on a person lawfully in custody, the court considered itself bound by *Bell v. Wolfish*, 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979), which had held that the unique security concerns of detention facilities could justify strip searches of pretrial detainees. *Justice*, 961 F.2d at 193. On the other hand, in stressing the intrusiveness of strip searches, the *Justice* court pointed to a context in which a strip search would certainly violate the Fourth Amendment: when it is inflicted on a student in a

situation that presents no danger of imminent and serious harm.

Picking up where Justice Stevens in *T.L.O.* left off, the *Justice* court favorably cited and discussed *Doe v. Renfrow*, 631 F.2d 91 (7th Cir. 1980), *cert. denied*, 451 U.S. 1022, 101 S. Ct. 3015, 69 L. Ed. 2d 395 (1981). 961 F.2d at 193. The Seventh Circuit in *Doe* held that a strip search of a thirteen-year-old student by school officials without reasonable suspicion to believe she possessed drugs clearly violated the Fourth Amendment, foreclosing qualified immunity for the school officials. *Justice* reaffirms and embraces this conclusion as obvious:

> [*Doe* held that] the strip search of a thirteen-year-old female without "reasonable cause" to believe she possessed contraband on her person constituted an "invasion of constitutional rights of some magnitude." *Doe*, 631 F.2d at 93. The Seventh Circuit then stated[,] "More than that: it is a violation of any known principle of human decency. . . . [T]he conduct herein described exceeded the 'bounds of reason' by two and a half country miles." *Doe*, 631 F.2d at 93.

Id. (bracketed alterations added).

Although these cases strongly support our position, we do not rely on them in reaching our holding in this case.

Even courts determining the constitutionality of strip searches of post-arrest detainees have looked to the

these offenses would exist at one end of the spectrum. Thefts of valuable items or large sums of money would fall a little more toward the center of the spectrum. Thefts of small sums of money or less valuable items and possession of minor, nondangerous contraband would fall toward the opposite extreme of the spectrum. Such infractions would seldom, and probably never, justify the

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probability that the detainee possesses dangerous contraband. *See, e.g., Masters v. Crouch*, 872 F.2d 1248, 1253-55 (6th Cir.) (strip search of person arrested for traffic violation or other minor offense not associated with violence unreasonable absent individualized reasonable suspicion that arrestee is carrying a weapon or contraband), *cert. denied*, 493 U.S. 977, 110 S.Ct. 503, 107 L. Ed. 2d 506 (1989); *Jones v. Edwards*, 770 F.2d 739 (8th Cir. 1985) (strip search of person arrested for refusing to sign summons regarding leash law violation unreasonable); *Stewart v. Lubbock County*, 767 F.2d 153 (5th Cir. 1985) (strip searches of minor offenders awaiting bond unreasonable absent reasonable suspicion that they possess weapons or contraband), *cert. denied*, 475 U.S. 1066, 106 S. Ct. 1378, 89 L. Ed. 2d 604 (1986); *Mary Beth G. v. Chicago*, 723 F.2d 1263, 1268-73, 1273 (7th Cir. 1983) ("[E]nsuring the security needs of the City by strip searching . . . was unreasonable without a reasonable suspicion by the authorities that either of the twin dangers of concealing weapons or contraband existed."); *Logan v. Shealy*, 660 F.2d 1007, 1013 (4th Cir. 1981) (strip search of arrested drunk driver unreasonable given that offense not associated with possession of weapons or contraband and no cause to believe that individual arrestee possessed either), *cert. denied*, 455 U.S. 942, 102 S. Ct. 1435, 71 L. Ed. 2d 653 (1982).

most intrusive searches. It follows that the infraction at issue here, the theft of $7, while perhaps not a trespass to be taken lightly, is, nonetheless, an offense which would not justify a highly intrusive search, and certainly not where the likelihood of finding evidence of the offense was as weak as it was here.

T.L.O. also requires us to take the student's age into consideration. The students in this case were extremely young, only second graders. The Supreme Court did not elaborate on how we should consider age. *See, e.g., Cornfield*, 991 F.2d at 1321 (discussing issue). Nevertheless, regardless of a student's age, *T.L.O.* forbids school officials from undertaking the most intrusive of searches where the infraction is relatively minor and presents no threat of imminent danger and where it is highly unlikely that the search will turn up evidence of the infraction. To conclude otherwise would be to read *T.L.O.* such that it does not protect elementary school students at all.

Considered together, the factors identified in *T.L.O.*--the glaring disproportion between the objectives of the searches and the measures adopted and the trivial nature of the infraction--point unequivocally to the unreasonableness of the two restroom searches at issue here. Even if the *T.L.O.* reasonableness standard is indeterminate for a broad category of school searches, it indisputably prohibits strip searches of students in this situation.[21] Sirmon and Herring, therefore, are not

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[21]Although we do not depend on the case law of other circuits in reaching this holding, we note that other courts have reached the same conclusion. *See Tarter v. Raybuck*,

entitled to qualified immunity, because the *T.L.O.* standard would have led any reasonable school official in their circumstances to the inevitable conclusion that the conduct charged here violated the Constitution.

The line drawn in *T.L.O.* may not be bright enough to dictate the results of cases closer to the line, for example, cases in which there is a reasonable suspicion that a student has hidden on his or her person drugs or weapons.[22] The facts presented at the summary

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742 F.2d 977, 982 (6th Cir. 1984) ("Thus, for example, the authority of the school official [to maintain school discipline and order] would not justify a degrading body cavity search of a youth in order to determine whether a student was in possession of contraband in violation of school rules."), *cert. denied*, 470 U.S. 1051, 105 S. Ct. 1749, 84 L. Ed. 2d 814 (1985); *Oliver v. McClung*, 919 F. Supp. 1206, 1216-19 (N.D. Ind. 1995) (in light of *Doe v. Renfrow* and *T.L.O.*, law clearly established that strip search of seventh-grade girls seeking missing $4.50 violates Fourth Amendment); *Bellnier v. Lund*, 438 F.Supp. 47, 52-54, 54 (N.D.N.Y. 1977) (strip searches of students in fifth grade class seeking missing $3 unreasonable "in view of the relatively slight danger of the conduct involved (as opposed to drug possession, for example), the extent of the search, and the age of the students involved").

[22]*See Cornfield v. Consolidated High Sch. Dist. No. 230*, 991 F.2d 1316, 1320-23, 1320 (7th Cir. 1993) (holding strip search of high school student based on reasonable suspicion that he possessed drugs does not violate Fourth Amendment, while making clear that a "a highly intrusive search in response to a minor infraction" would be

judgment stage in the case now before us, however, are clearly far to the unconstitutional side of that line. Cassandra and Onieka were eight-year-old elementary school students. They were accused of stealing $7 that may or may not have been missing, solely on the basis of the accusation of a second-grade classmate; there was no evidence that they had ever before stolen money or hidden anything in their clothing. Even if the girls had possessed the cash (which they apparently did not), their infraction would have threatened no imminent or serious harm. Nevertheless, even after investigations of Onieka's backpack and both girls' shoes and socks had revealed no money and without making any further inquiries into the matter, Herring and Sirmon twice forced Cassandra and Onieka to undress and submit to inspection. Reasonable teachers or school officials in their positions could not have believed that the Fourth Amendment, in light of T.L.O., would allow such a search. We conclude, based on the facts presented at the summary judgment stage, that Herring and Sirmon acted in blatant disregard of the Fourth Amendment. Consequently, they are not entitled to qualified immunity.

V.

The district court's orders granting summary judgment for defendants Herring and Sirmon on the basis of qualified immunity from plaintiffs' § 1983 Fourth Amendment claims are REVERSED. The district court's

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unconstitutional under *T.L.O.*); *Williams v. Ellington*, 936 F.2d 881 (6th Cir. 1991) (granting qualified immunity to school officials who strip searched two high school students for drugs on at least reasonable suspicion).

other summary judgment orders in this case are AFFIRMED.

BIRCH, Circuit Judge, dissenting:

I respectfully dissent. Although I am outraged by the conduct of the schoolteachers in this case and am convinced that they left their better judgment at home on May 1, 1992, I cannot conclude that these individuals understood or should have understood that the strip searches that they conducted were violative of the clearly established Fourth Amendment rights of these second-grade students. While it is easy to second-guess school personnel in a courthouse far removed from the tumult and tumble of the work-a-day world of the schoolhouse with the aid of twenty-twenty hindsight, the majority does a grave disservice to our law and to public servants in determining that these individuals violated the exceedingly limited constitutional rights of schoolchildren.[1] *See C.B.*

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[1]The "special characteristics of elementary and secondary schools . . . make it unnecessary to afford students the same constitutional protections granted adults and juveniles in a nonschool setting." *New Jersey v. T.L.O.*, 469 U.S. 325, 348, 105 S. Ct. 733, 746, 83 L. Ed. 2d 720 (1985) (Powell, J., concurring). Because of their close association with each other and the necessary familiarity of teachers with students and authority over them, such schoolchildren "have a lesser expectation of privacy than members of the population generally." Id. The Supreme Court has stated that the *T.L.O.* decision determined that the "State's power over schoolchildren is formally no more than the delegated power of their parents, . . . but indeed emphasized, that the nature of

ex rel. Breeding v. Driscoll, 82 F.3d 383, 385 (11th Cir. 1996). Furthermore, no policy had been formulated by the Talladega City Board of Education or the Graham Elementary School regarding student searches during the 1991-1992 school year. Stolen money previously had been recovered through searches of students' attire at Graham Elementary School.[2] Moreover, as the district judge

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that power is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults." *Vernonia School Dist. 47J v. Acton*, --- U.S. ----, ----, 115 S. Ct. 2386, 2392, 132 L. Ed. 2d 564 (1995) (upholding urinalysis drug testing for grade and high school students participating in athletic programs, including reasoning that public school children are required to have vaccinations and physical examinations).

[2]The record reveals at least two incidents at Graham Elementary School prior to the searches challenged in this case where students, suspected of stealing money, were required to remove their shoes and socks with the result that the money was found. One involved a black, male student accused of stealing $5; the principal had him remove his shoes and socks and located the money. Another instance concerned a white, male student accused of stealing $.50; the missing change was discovered when the student was asked to remove his shoes and socks. The record also includes evidence of a search for a missing calculator where a number of students, both black and white, were instructed to remove their jackets so that their pockets could be searched. Additionally, there were incidents of students removing shoes and socks, untucking and shaking their shirts, unzipping their pants, and one student stripping entirely

ascertained, there was no binding, clearly established law that these schoolteachers violated in conducting the challenged strip searches.

"For the law to be clearly established to the point that qualified immunity does not apply, the law must have earlier been developed in such a concrete and factually defined context to make it obvious to all reasonable government actors, in the defendant's place, that 'what he

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in the presence of school officials, a police officer, and his mother to search for contraband. Given this background of previously locating stolen money in students' attire pursuant to varying degrees of supervised undress and, particularly, the location of stolen money after having suspected students remove their shoes and socks, the challenged searches conducted by the schoolteachers in this case were not totally unprecedented, as the majority suggests. Majority at 1045 n.19; *see Driscoll*, 82 F.3d at 388 (finding that *T.L.O.* held that "school officials need only 'reasonable grounds for suspecting' that a search will turn up evidence that the student has violated either the law or school rules" (quoting *T.L.O.*, 469 U.S. at 342, 105 S. Ct. at 743)); *Alabama Student Party v. Student Gov't Ass'n of the Univ. of Alabama*, 867 F.2d 1344, 1346 (11th Cir. 1989) (acknowledging that *T.L.O.* requires easing of the restrictions generally applicable to the Fourth Amendment in a school context); *see also Lenz v. Winburn*, 51 F.3d 1540, 1551 (11th Cir. 1995) (recognizing that the reasonableness or unreasonableness of a search under the Fourth Amendment is determined on a case-by-case basis (*citing T.L.O.*, 469 U.S. at 337, 105 S. Ct. at 740)).

is doing' violates federal law."[3] *Lassiter v. Alabama A & M Univ.*, 28 F.3d 1146, 1149 (11th Cir. 1994) (*en banc*) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039, 97 L. Ed. 2d 523 (1987)) (emphasis added). The *Lassiter* court admonished that the facts of cases relied upon as precedent must be "materially similar"; "[p]ublic officials are not obligated to be creative or imaginative in drawing analogies from previously decided cases." *Id.* at 1150 (quoting *Adams v. St. Lucie County Sheriff's Dept.*, 962 F.2d 1563, 1575 (11th Cir. 1992) (Edmondson, J., dissenting), *adopted en banc*, 998 F.2d 923 (11th Cir. 1993) (*per curiam*)) (alteration in original). If the standard for qualified immunity were whether preexisting law had established that the strip searches by the schoolteachers in this case, when they occurred, might have been unlawful under federal law, then the majority opinion might be correct. That standard, however--the "it might be unlawful" standard--according to the Supreme Court and repeated decisions of this court is not the proper standard. *See Muhammad v. Wainwright*, 839 F.2d 1422, 1425 (11th Cir. 1987) ("[A]t the relevant time, defendants, at best, had only some reason to suspect that their actions might be unlawful. Such a suspicion is inconsistent with the 'clearly established' standard enunciated by *Harlow* [*v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)]

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[3]"The qualified immunity standard 'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.' " *Hunter v. Bryant*, 502 U.S. 224, 229, 112 S. Ct. 534, 537, 116 L. Ed. 2d 589 (1991) (*quoting Malley v. Briggs*, 475 U.S. 335, 341, 343, 106 S. Ct. 1092, 1096, 1097, 89 L. Ed. 2d 271 (1986)).

and its progeny."); *see also Davis v. Scherer*, 468 U.S. 183, 196, 104 S. Ct. 3012, 3020, 82 L. Ed. 2d 139 (1984) ("[O]fficials should not err always on the side of caution."); *accord Lassiter*, 28 F.3d at 1149; *Lenz v. Winburn*, 51 F.3d 1540, 1551 (11th Cir. 1995).

Indeterminacies, speculations, and predictions have no place in our qualified immunity law. Elementary schoolteachers, nonlawyers whose primary responsibilities are education and the daily administration of their classrooms, cannot be required to foresee how the Eleventh Circuit would apply Supreme Court precedent and decide this particular factual situation if presented. That would be not only an unprecedented but also an unreasonable standard. Accordingly, the majority's reliance on *New Jersey v. T.L.O.*, 469 U.S. 325, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985), involving the purse search of a high school student and the discovery of contraband, is misplaced because *T.L.O.* is not factually similar to the strip searches that we review and cannot be clearly established law to resolve this case, much less dicta in *T.L.O.*

Because of its "practical application," qualified immunity is judged by the conduct of government personnel at the time that they acted, "not by hindsight, based on later events." *Lassiter*, 28 F.3d at 1150; *see Hunter v. Bryant*, 502 U.S. 224, 228, 112 S. Ct. 534, 537, 116 L. Ed. 2d 589 (1991) (*per curiam*) ("[T]he court should ask whether the agents acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact." (emphasis added)). On May 1, 1992, the date of the strip searches at issue in this case, there was no clearly

established law regarding the unconstitutionality of strip searches of schoolchildren from the Supreme Court, the Eleventh Circuit, or the Alabama Supreme Court.[4] *See Courson v. McMillian*, 939 F.2d 1479, 1498 n. 32 (11th Cir. 1991) (holding that "clearly established" law for deciding qualified immunity in this circuit consists of effective decisions at the time of the challenged conduct by the United States Supreme Court, the Eleventh Circuit Court of Appeals, or the highest state court in the state where the case originated); *accord Hamilton ex rel. Hamilton v. Cannon*, 80 F.3d 1525, 1532 n. 7 (11th Cir. 1996); *Haygood v. Johnson*, 70 F.3d 92, 95 (11th Cir. 1995) (*per curiam*); *D'Aguanno v. Gallagher*, 50 F.3d 877, 881 n.6 (11th Cir. 1995).

Whatever bolstering of its decision the majority seeks to accomplish by the repetition of *dicta* in *Justice v. City of Peachtree City*, 961 F.2d 188 (11th Cir. 1992), decided on May 14, 1992, is inappropriate. See Majority at 1044, 1046-47 n.20. Not only did that case involve the lawful, custodial strip search of a female high school student upon reasonable suspicion that she possessed contraband, but also *Justice* could not have been clearly established law for the subject strip searches of these

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[4]The majority appears to be "interested in the state of the law at the time of the alleged unconstitutional conduct, May 1, 1992." Majority at 1043 n.13. Yet, the majority concedes that "this circuit, before May 1, 1992, had not had the opportunity to apply *T.L.O.*'s standards in factually similar circumstances," *id.* at 1043, and that "no case involving a student strip search had been presented to this court before the incidents in this case occurred," *id.* at 1046-47 n.20.

second-graders that occurred thirteen days earlier. Equally inapplicable under our circuit definition of clearly established law as to the date of the questioned conduct is nonbinding case law of other federal circuit and district courts. *Cf. id.* at 1043 ("If the facts of other cases applying the balancing test or the test itself leads to such an 'inevitable conclusion,' then the 'bright-line' has been drawn."); *see id.* at 1047 & n. 21.

I agree that, for preexisting law to establish that a particular act is unlawful, it is not essential that the facts of the earlier case be identical to the facts surrounding the conduct that is being challenged as unlawful. For example, if a precedent holds that, under certain circumstances, it is unlawfully cruel to cut off two fingers, that precedent clearly would establish that it would be unlawful to cut off three fingers under the same circumstances. This case, however, has nothing to do with that kind of case law.[5] In this case, no precedent is factually close enough to have given much guidance to these schoolteachers under the circumstances. Sitting *en banc*, we have said--over Judge Kravitch's dissents--that public officials need not be able to draw analogies from earlier cases to avoid personal liability for damages. *Lassiter*, 28 F.3d at 1150; *Adams*, 998 F.2d at 923. For

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[5]The majority observes that some conduct is so egregious that no case needs to have recognized previously that such conduct violates federal law. Majority at 1041 n.9. Accepting this idea in principle, I am comfortable in saying that I think we face in this case no great act of pure evil (such as, to use the majority's example, slavery), that might trigger this rare and narrow exception to the extremely broad rule.

elementary schoolteachers to be competent in their jobs, it is not yet required that they think like a constitutional lawyer, much less like an activist one. Moreover, we have said repeatedly *en banc*--again in the face of Judge Kravitch's dissents--that the cases serving as precedent, those that supposedly established the law applicable to the circumstances in which a defendant public official found himself, must be materially similar factually to the circumstances confronting the defendant public official if that earlier case law is to guide public officials sufficiently to place them in jeopardy of losing immunity. *See Lassiter*, 28 F.3d at 1149-51; *Adams*, 998 F.2d at 923.

No decision cited by the majority provides adequate precedent as clearly established law to guide the conduct of the schoolteachers in this case. Unlike many cases cited by the majority to support its decision, this case does not involve police officers or law enforcement personnel. This case is about schools. Significantly, it concerns a specific type of school, an elementary school.

A high school and an elementary school are materially different places. The children in an elementary school are considerably younger and less mature, including less physically mature, than high school students. In elementary schools, the relationship between the teacher and students, who are young children, is much closer to that of parent and child than in high schools, where the students are approaching adulthood. In the first two or three grades in elementary school, the notion of *in loco parentis*, where teachers stand in the place of parents, has real meaning and a long and venerable

tradition.[6] For example, many a young schoolchild properly has been helped to change clothes, consisting of putting on or taking off clothes, by a schoolteacher.

The Supreme Court's *T.L.O.* decision involved a teenage high school student, obvious violation of the established school rule against smoking, and a consequent purse search revealing contraband. These facts materially distinguish *T.L.O.* from this case. The Supreme Court's opinion in *T.L.O.* was written against the background of the facts before it. While *T.L.O.* contains some general language to guide trial courts faced with searches by school employees, that standard is a broadly composed one: basically, it is a reasonableness test. The

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[6]The Court has recognized that "school authorities act[] *in loco parentis*." *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 684, 106 S. Ct. 3159, 3165, 92 L. Ed. 2d 549 (1986).

> Whether it should or should not do so, the American community calls upon its schools to, in substance, stand in loco parentis to its children for many hours of each school week.
>
> Citizens expect and demand that their children be physically safe in the schools to whose supervision
>
> they are consigned, and the citizenry is outraged if the schools are less than safe and orderly.

Ferrell v. Dallas Indep. School Dist., 392 F.2d 697, 704 (5th Cir.) (Godbold, J., concurring), *cert. denied*, 393 U.S. 856, 89 S. Ct. 98, 21 L. Ed. 2d 125 (1968).

"reasonableness, under all the circumstances" rule in *T.L.O.* gives little practical guidance to teachers facing facts unlike those in *T.L.O.* *T.L.O.*, 469 U.S. at 341, 105 S. Ct. at 742. As we explained *en banc* in *Lassiter*, an abstract standard is insufficient guidance until trial courts have demonstrated its application in various factual situations. *Lassiter*, 28 F.3d at 1150.

The facts of *T.L.O.* are too different from this case to have dictated to reasonable elementary schoolteachers that the searches conducted already had been clearly established as unlawful. This conclusion, that is, that preexisting law did not dictate to reasonable teachers that their conduct in this case was unconstitutional, seems particularly strong upon consideration that the Supreme Court, aside from college and university cases, has never held any search based on individualized suspicions of a student by schoolteachers, including the *T.L.O.* search, to be unlawful under federal law, and neither have we or the former Fifth Circuit. Consequently, no bright lines had been delineated to help the teachers in this case to know what to do.[7]

While I agree that, for preexisting law to dictate a result in a particular case, the facts need not be exactly the same, they must be considerably closer than the analogies that the majority uses. Clearly established, preexisting law is a pragmatic concept, which the Supreme

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[7]Clearly, the facts and law in this case do not support the majority's conclusion that the elementary schoolteachers were not entitled to qualified immunity because their challenged searches were "in blatant disregard of the Fourth Amendment." Majority at 1048.

Court has stressed repeatedly. In my judgment, clearly established law means what it says, and our circuit cases teach that it means more than the majority of this panel seems to think that it means.

In conducting the challenged searches in this case, the schoolteachers might not have exercised good judgment or done what was right, but that is a very different concept from concluding that they violated clearly established federal law. The schoolteachers' searches at issue in this case even may have violated the Fourth Amendment, but that conclusion is not unquestionably clear to me under our present circuit law.[8] It does seem plain to me, given *T.L.O.*'s sliding

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[8]Theft of money is hardly a trivial matter, and there was cause for suspicion in this case. Nevertheless, the schoolteachers and the students were female, and the search was done in a relatively private place, the girls' restroom. I hasten to emphasize that conduct that may be constitutional also may be repugnant, ill-advised, and even outrageous. The strip searches in this case may have been offensive, but they did not violate clearly established constitutional law, when they occurred.

The thrust of the majority's opinion seems to be an effort to diminish the importance of this court's *en banc* decision in *Lassiter*. I cannot agree with this construction of a guiding circuit precedent. Inherently, *en banc* decisions are extremely important. This court does not go *en banc* casually. We do so "(1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance." FED. R.

scale of reasonableness in view of all of the circumstances and the specific situation confronting the school personnel in this case, that by no means was it already clearly established when the school personnel acted that their conduct was unlawful. To say otherwise, I respectfully submit, is to demote a common sense safeguard--clearly

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APP. P. 35(a). I believe that *Lassiter* went *en banc* on both grounds.

The majority stresses that *Lassiter* represented no "sea change" in the law of qualified immunity. Majority at 1040. That statement is absolutely correct because the great majority of the judges of this circuit regularly were applying the principles set forth in *Lassiter* before *Lassiter* was published. *See Lassiter*, 28 F.3d at 1149 ("No new rules need to be announced to decide this case. But, for emphasis, we restate principles which do govern qualified immunity cases."). A few judges of this court, however, were taking a significantly different approach to qualified immunity, an approach which was manifestly more hostile to public official defendants. In this sense, *Lassiter* marks a substantial change for those judges who thought that, and acted as if, the law was something different from the law that *Lassiter* reiterates.

Lassiter seems particularly important when one realizes that this court had made a previous *en banc* effort to declare the law of the circuit not long before. *Adams*, 998 F.2d at 923. Informed observers refer to *Lassiter* as *Adams II*. When *Adams* proved ineffective to secure uniformity, the court promptly went *en banc* again and rendered *Lassiter* with its stronger and more definitive statements. In my view, *Lassiter* is the law.

established law--to a legal fiction.

While explaining its decision, the majority has written many statements that conflict with the law of this circuit, as I understand it. I am not going to bicker, however. Whatever our precedents say, they speak for themselves. Looking chiefly at *Lassiter*, the district judge believed that the law of this circuit required him to grant qualified immunity. I think that the judge was right, and I would affirm the district court's judgment.

Order Granting Rehearing *En Banc*

(October 16, 1996)

Cassandra JENKINS, a minor, by her mother and next friend, Sandra HALL; Onieka McKenzie, a minor, by her mother and next friend, Elizabeth McKenzie,
Plaintiffs-Appellants,

v.

TALLADEGA CITY BOARD OF EDUCATION; Susannah Herring, individually and in her capacity as a teacher of Graham Elementary School; Melba Sirmon, individually and in her capacity as counselor at Graham Elementary School,
Defendants-Appellees,

Charles Kurley, in his official capacity as Superintendent of the Talladega City School District, et al.,
Defendants.

No. 95-6243.

United States Court of Appeals,
Eleventh Circuit.

October 16, 1996.

Before HATCHETT, Chief Judge, and TJOFLAT, KRAVITCH, ANDERSON,

EDMONDSON, COX, BIRCH, DUBINA, BLACK, CARNES and BARKETT, Circuit Judges.

Oct. 16, 1996

BY THE COURT:

A member of this court in active service having requested a poll on whether this case should be reheard by the Court sitting en banc, and a majority of the judges of this court in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the above cause shall be reheard by this court en banc. The previous panel's opinion is hereby VACATED.

District Court Order

(September 22, 1994)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

CASSANDRA JENKINS, a minor, et al.,)
)
PLAINTIFFS,)
)
v.) CV 94-PT-739-E
)
TALLADEGA CITY BOARD OF EDUCATION, et al.,)
)
DEFENDANTS.)

ORDER

The court recognizes that plaintiff's complaint and amended complaint allege violations of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, as well as violations of §1983. The court's orders granting summary judgment to all individual defendants on the basis of qualified immunity were intended to address only § 1983 claims based on violations of the Fourth Amendment via the Fourteenth Amendment. Those orders were not intended to apply to any possible claims against any individual defendants on other federal

statutory bases. The court's orders are amended to **VACATE** any dismissals of any federal claims *other* than said § 1983 claims based on alleged violations of the Fourth Amendment via the Fourteenth Amendment. The court has not addressed whether the qualified immunity doctrine applies to claims other than those which are constitutionally based. Further, the court has not addressed whether the other statutory claims can be maintained against individual employees of a school board.

DONE and ORDERED this 22nd day of September, 1994.

/s/

ROBERT B. PROPST
UNITED STATES DISTRICT JUDGE

District Court Memorandum Opinion

(September 15, 1994)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

CASSANDRA JENKINS, a minor, et al.,)
)
PLAINTIFF,)
)
v.) CV 94-PT-0739-E
)
TALLADEGA CITY BOARD OF EDUCATION, et al.,)
)
DEFENDANT.)

MEMORANDUM OPINION

The court has reconsidered its earlier conclusion that defendants Melba Sirmon and Susannah Herring were not entitled to qualified immunity. The court's *sua sponte* reconsideration was prompted by a recent series of Eleventh circuit Court cases which have addressed the doctrine of qualified immunity.[1] These cases include *Lassiter v. Alabama A & M Univ.*, 28 F.3d 1146 (11th Cir.

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[1]The court gave the parties an opportunity to respond to the court's suggested reconsideration. Defendants have responded. Plaintiffs have not.

1994); *Spivey v. Elliott*, _____ F.3d _____ (11th Cir. 1994); *Post v. City of Ft. Lauderdale*, 7 F.3d 1552 (11th Cir. 1993); and, even more recently, *Belchar v. City of Foley, Alabama*, _____ F.3d _____ (11th Cir. 1994). The court had also noticed a reference to *Hansen v. Soldenwagner*, 19 F.3d 573 (11th Cir. 1994) which provides that the case law of one circuit does not clearly establish the law. The court has also considered the earlier cited Eleventh Circuit case (see earlier memorandum) with reference to strip searches of juveniles accused of *minor* offenses.[2] After reconsidering all of the foregoing, this court concludes that said defendants are entitled to qualified immunity as to the federal claims. The law was not clearly established in the Eleventh Circuit with regard to the conduct at issue. There is no "bright line." There is no reasonable inference that these defendants were plainly incompetent or that they knowingly violated clearly established law. This court concludes that it over credited *Doe v. Renfrow*, 631 F.2d 91 (7th Cir. 1980) and a Supreme Court footnote. A separate order will be filed.[3]

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[2]*Justice v. City of Peachtree City*, 961 F.2d 188 (11th Cir. 1992). The court's reference in that case to "strip searches [being] . . . valuable law enforcement tools" could suggest to a reasonable school teacher that she was doing no wrong.

[3]For a possible question as to whether *Doe v. Renfrow* "clearly established" the law, see *Cornfield v. Consolidated High School District No. 230*, 991 F.2d 1316 (7th Cir. 1993).

This 14th day of September, 1994.

/s/
ROBERT B. PROPST
UNITED STATES DISTRICT JUDGE

District Court Order

(September 15, 1994)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

CASSANDRA JENKINS, a minor, et al.,)
)
PLAINTIFF,)
)
v.) CV 94-PT-0739-E
)
TALLADEGA CITY BOARD OF EDUCATION, et al.,)
)
DEFENDANT.)

ORDER

Upon reconsideration, the court **DISMISSES** the federal claims against defendants Melba Sirmon and Susannah Herring based on qualified immunity.[1]

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[1]The court has not considered any possible immunity as to state law claims.

DONE and ORDERED this 14th day of September, 1994.

/s/

ROBERT B. PROPST
UNITED STATES DISTRICT JUDGE

District Court Memorandum Opinion

(August 17, 1994)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

CASSANDRA JENKINS, a minor, et al.,)
)
PLAINTIFF,)
)
v.) CV 94-PT-0739-E
)
TALLADEGA CITY BOARD OF EDUCATION, et al.,)
)
DEFENDANT.)

MEMORANDUM OPINION

This cause comes on to be heard on defendants' Motion To Dismiss converted by the court to a Motion for Summary Judgment.[1] The *Adams* case enunciates

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[1]This court has an obligation to, early on, consider such motions, particularly as they relate to assertions of qualified immunity. *See Adams v. St. Lucie County Sheriff's Dept.*, 998 F.2d 923 (11th Cir. 1993) adopting dissenting opinion at 962 F.2d 1563 (11th Cir. 1992). Qualified immunity relates to a defendant's right not to stand trial.

several standards which must be applied when trial courts consider qualified immunity assertions. These include that:

(1) Plaintiff bears the burden of showing that, at the time of the alleged incident, it was clearly established that the alleged conduct of the defendants[2] violated a Constitutional right.

(2) Plaintiff cannot discharge his or her burden by making general conclusory allegations of some constitutional right or by stating broad legal truisms.

(3) Plaintiff must prove the existence of a clear, *factually defined*, well-recognized, particularized right of which the charged state actor should have known.

(4) The facts of cases relied upon must be materially similar.

(5) Public officials are not obligated to be creative or imaginative in drawing analogies from previously decided cases.

(6) District courts cannot "clearly establish" law.

(7) Defendants bear no burden to show that the law is unsettled.

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[2]The court is, of course, considering only defendants sued in their individual capacities with reference to qualified immunity assertions.

(8) General propositions of law are "just not helpful."

On July 28, 1994, the court directed the plaintiffs to specifically state what Constitutional right was violated by each individual defendant and to cite clearly established law that should have caused the defendant to believe that his or her actions were unlawful in light of the information possessed by the defendant at the time the conduct occurred. On August 8, 1994, plaintiffs filed a response to the court's order. The court will not repeat all the statements in the plaintiffs' filing, but will address each defendant separately.[3]

James Braswell

Alleged facts.

1. Member of board.

2. Responsible for ensuring that "schools within the jurisdiction of the Board established and followed disciplinary policies that were fairly administered and that

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[3]Since the Talladega City Board of Education (Board) is named as a defendant, the court will dismiss all claims against all individual defendants in their "official capacities." *Busby v. City of Orlando*, 931 F.2d 764, 776 (11th Cir. 1991). It is not clear why some Board members were sued *only* in their official capacities. Plaintiffs have withdrawn their claims against defendant Ray Miller, individually. Thus the "individual" capacity claims to be considered are those against defendants Braswell, O'Brien, Nelson, Sirmon and Herring.

did not violate established constitutional principles." There was no such policy. Further, he condoned the actions of Herring and Sirmon by failing to discipline them.[4]

Cited law.

The court will not repeat the law cited by plaintiffs. Suffice it to say it does not address the issue of whether Braswell, as a Board member, had the Constitutional duty to establish a policy which would have foreclosed the possibility of the alleged violations. Nor is any law cited with reference to alleged condoning of said acts. If plaintiffs' attorneys cannot locate such law, after notice and research,[5] Braswell could not have been expected to know that the law was "clearly established." The claims against defendant James E. Braswell will be dismissed.

Michael O'Brien

For same reasons as to defendant Braswell, the claims against defendant Michael O'Brien will be dismissed.[6]

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[4]The court does not reach the issue of whether the latter allegation involves a claim that resulted in any injury to plaintiffs.

[5]Presumably some research even before filing the action.

[6]Plaintiffs adopted their statements with reference to Braswell as their response with reference to O'Brien. Although *Doe v. Renfrow*, 631 F.2d 91 (7th Cir. 1980) suggests some possible liability against a principal, board

Crawford Nelson

The ruling as to Nelson is even more obvious. No particular law has been cited to support the argument that Nelson should have known that he had the responsibility to train teachers not to strip search or of informing parents "when their children's constitutional rights have been violated." As with Braswell and O'Brien, plaintiffs have cited only general, conclusory law related to the act of strip searching. The claims against defendant Crawford Nelson will be dismissed.[7]

Melba Sirmon

Defendant Sirmon is alleged to have personally participated in the strip searching. Although it might be ludicrous to suggest that *Sirmon* had an obligation to

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members, etc., the basis for this alleged liability is not stated. Here, neither the Board members nor the principal are alleged to have created a policy which affirmatively authorized the alleged conduct. Nor is it alleged that they participated therein. *See Brown v. Crawford*, 906 F.2d 667, 671 (11th Cir. 1990) which holds that in order to put a supervisor on notice of need to protect against abuses, "The deprivations that constitute widespread abuse sufficient to notify the supervising official must be obvious, flagrant, rampant and of continued duration. . . ." There is no such suggestion here.

[7]If there is any doubt about the "particularized" element, see *Adams, supra* and *Wright v. Whidden*, 951 F.2d 297 (11th Cir. 1992).

survey Seventh Circuit cases, apparently she had constructive knowledge of this case and, apparently, it "clearly established the law." *See Doe v. Renfrow*, 631 F.2d 91 (7th Cir. 1980); *cert. denied* 451 U.S. 1022 (1981), *Justice v. City of Peachtree City*, 961 F.2d 188 (11th Cir. 1992) involved a juvenile in custody after a lawful arrest. The court held that law enforcement officers may conduct a strip search of a juvenile in custody, even for a minor offense, based upon reasonable suspicion to believe that the juvenile is concealing contraband. The court stated, "It is axiomatic that a strip search represents a serious intrusion upon personal rights." After citing *Doe v. Renfrow, supra*, the Eleventh Circuit stated, in the context of that case, "Nevertheless, strip searches are valuable law enforcement tools. . . ." This court does not conclude that, as to a school setting, *Justice* dilutes the holding in *Doe v. Renfrow*. *See also Good v. Dauphin County Social Services, etc.*. 891 F.2d 1087 (3d Cir. 1989); *Tarter v. Raybuck*, 742 F.2d 977 (6th Cir. 1984); and *Darryl H. v. Coler*, 801 F.2d 893 (7th Cir. 1986). *Particularly see New Jersey v. T.L.O.*, 469 U.S. 325, 382 n. 25 (1985). The motion will be denied as to defendant Melba Sirmon.

Susannah Herring

For the same reasons discussed above as to defendant Sirmon, the motion will be denied as to defendant Herring.

The court also required the parties to specifically address the claim against the Talladega City Board of Education. The Board is, of course, not entitled to a qualified immunity assertion.

The Board filed a response to the court's order. After considering the response, the court cannot determine, as a matter of law, that the Board did not delegate the final policy making authority as to strip searching to others. The Board's motion will be denied.[8]

This 17th day of August, 1994.

/s/
ROBERT B. PROPST
UNITED STATES DISTRICT JUDGE

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[8]The attachment to the Board's response includes a statement that "Each school shall adopt their [sic] own rules . . . ." (See 19 on page 3 or 20 of "Policy on Discipline").

District Court Order

(August 17, 1994)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

CASSANDRA JENKINS, a minor, et al.,)
)
PLAINTIFF,)
)
v.) CV 94-PT-0739-E
)
TALLADEGA CITY BOARD OF EDUCATION, et al.,)
)
DEFENDANT.)

ORDER

In accordance with a Memorandum Opinion filed contemporaneously herewith, all claims against all defendants, *except* the claims against defendants Sirmon and Herring in their individual capacities, and the claims against the Talladega City Board of Education, are **DISMISSED, WITH PREJUDICE.**[9]

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[9]The dismissal includes both federal and state law claims. As to the state law claims, there is no suggestion that any defendants other than Sirmon and Herring personally participated. If plaintiffs have evidence

DONE and **ORDERED** this 17th day of August, 1994.

/s/
ROBERT B. PROPST
UNITED STATES DISTRICT JUDGE

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otherwise, they should call it to the court's attention within 10 days. As to Sirmon, Herring and the Board, the court **DENIES** the motion as to all claims.

Supreme Court, U.S.
FILED
OCT 6 1997
CLERK

(2)

No. 97-381

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CASSANDRA JENKINS, a minor, by her mother, SANDRA HALL, and ONEIKA MCKENZIE, a minor, by her mother, ELIZABETH MCKENZIE,
Petitioners,

vs.

SUSANNAH HERRING and MELBA SIRMON,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the standard employed by the Eleventh Circuit Court of Appeals in determining whether the law is clearly established for qualified immunity purposes conflicts with decisions of this Court and other courts of appeals?

2. Whether the circuit court's holding that *New Jersey v. T.L.O.*, 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985), did not clearly proscribe the actions of Herring and Sirmon such that they should be stripped of qualified immunity conflicts with decisions of this Court and other courts of appeals?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	vi
RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	1
I. The Alleged Search	1
II. Board Findings and Findings of the Office for Civil Rights	3
III. Procedural History	3
REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI	7
I. THE ELEVENTH CIRCUIT COURT OF APPEALS' STANDARD FOR DETERMINING WHETHER THE LAW IS CLEARLY ESTABLISHED FOR QUALIFIED IMMUNITY PURPOSES DOES NOT CONFLICT WITH DECISIONS OF THIS COURT. FURTHER, THOUGH THERE IS SOME CONFLICT AMONG THE CIRCUITS AS TO THE RELEVANCE OF NON-BINDING PRECEDENT IN DETERMINING WHETHER THE LAW WAS CLEARLY ESTABLISHED, THE ELEVENTH CIRCUIT'S	

HOLDING IS NOT IN CONFLICT WITH THAT OF SEVEN OTHER CIRCUITS..... 7

A. The Eleventh Circuit Court of Appeals' standard for determining whether the law is clearly established for qualified immunity purposes does not conflict with this Court's decision in *U.S. v. Lanier.* 7

B. The Eleventh Circuit Court of Appeals' standard for determining whether the law is clearly established comports with this Court's decisions concerning qualified immunity. 12

C. Though there is some conflict among the circuits as to the relevance of NON-BINDING precedent in determining whether the law was clearly established, the Eleventh Circuit's holding is not in conflict with that of seven other circuits. 15

D. To the extent the petitioners seek to have this Court speak to the merits of this case, such is not properly before this Court. .. 17

II. THE COURT OF APPEALS' HOLDING THAT *NEW JERSEY V. T.L.O.* DID NOT CLEARLY PROSCRIBE THE ACTIONS OF HERRING AND SIRMON SUCH THAT THEY SHOULD BE STRIPPED OF QUALIFIED IMMUNITY DOES NOT CONFLICT WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS. 18

A. The decision of the Eleventh Circuit Court of Appeals does not conflict with *New Jersey v. T.L.O.* 18

B. The Eleventh Circuit's decision does not conflict with decisions of the Sixth and Seventh Circuits or the Supreme Court of West Virginia. 22

CONCLUSION 25

TABLE OF AUTHORITIES

Page(s)

Cases:

Adams v. St. Lucie County Sheriff's Dept., 962 F.2d 1563 (11th Cir. 1992) (Edmondson, J. dissenting) (adopted en banc 998 F.2d 923 (11th Cir. 1993) .. 14

Anderson v. Creighton, 483 U.S. 635 (1987) .....*passim*

Bonitz v. Fair, 804 F.2d 164 (1st Cir. 1986), overruled in part on other grounds, *Unwin v. Campbell*, 863 F.2d 124 (1988) 16

Cornfield v. Consolidated School District No. 230, 991 F.2d 1316 (7th Cir. 1993) .....*passim*

Courson v. McMillan, 939 F.2d 1479 (11th Cir. 1991) 11,15

Doe v. Renfrow, 631 F.2d 91 (7th Cir. 1980) (per curiam), cert. denied, 451 U.S. 1022 (1981) .....*passim*

Hamilton v. Cannon, 80 F.3d 1525 (11th Cir. 1996) ... 11

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 7,11,12

Lassiter v. Alabama A&M Univ., 28 F.3d 1146 (11th Cir. 1994) (en banc) 10,14

Mitchell v. Forsyth, 472 U.S. 511 (1985) .....*passim*

New Jersey v. T.L.O., 469 U.S. 325 (1985) .....*passim*

Procunier v. Navarette, 434 U.S. 555 (1978) 11

State ex rel. Galfard v. Mark Anthony B., 433 S.E.2d 41 (W.Va. 1993) 23,24

United States v. Lanier, 117 S.Ct. 1219 (1997) .....*passim*

Vernonia School District 47J v. Acton, 515 U.S. ___, 115 S.Ct. 2386 (1995) 21

Williams v. Ellington, 936 F.2d 881 (6th Cir. 1991) 21,23,24

Statutory Provisions:

17 U.S.C. § 242 8,11

42 U.S.C. § 1983 ..... *passim*

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents Susannah Herring and Melba Sirmon respectfully request that the Petition for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit be denied.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The questions raised by the Petition for Writ of Certiorari involve qualified immunity under 42 U.S.C. § 1983. The underlying claims asserted in the complaint are based on the Fourth Amendment.

STATEMENT OF THE CASE

I. The Alleged Search

In 1992, petitioners Cassandra Jenkins and Oneika McKenzie were second grade students in the Talladega City School District. (Pet. App. 3A) Near the end of the school day on May 1, 1992, a classmate of Jenkins and McKenzie informed their teacher, Hilda Fannin, that seven dollars was missing from her purse. (Id.) Fannin asked her class if anyone knew where the money might be found. Another of Jenkins' and McKenzie's classmates told Fannin that Jenkins had taken the money and placed it in McKenzie's backpack. (Pet. App. 3A) Fannin searched McKenzie's backpack, but did not find the money. (Pet. App. 3A)

Two more students accused Jenkins and McKenzie of the theft. (Id.) While Fannin was questioning McKenzie and Jenkins in the hallway, each accused the other of taking the money. (Id.) Jenkins and McKenzie then jointly accused another student, Anthony Jamerson, of the theft. (Pet. App. 40A)

While Fannin was questioning the students in the hallway, respondent Susannah Herring approached. (Pet. App. 40A) Herring told Fannin that the students might have hidden the money in their socks or their shoes and instructed them to remove their shoes and socks. (Pet. App. 3A) When no money was found, Fannin informed Herring that McKenzie had repeatedly asked and had been given permission to go to the restroom after the regular restroom break. (Pet. App. 63A)

Respondent Melba Sirmon, the guidance counselor, entered the hallway and accompanied Herring, Jenkins and McKenzie to the girls' restroom. (Pet. App. 3A) In the restroom, Herring told Jenkins and McKenzie that they needed to check their clothes. (Pet. App. 40A) Jenkins and McKenzie entered separate stalls and locked the doors behind them. (Pet. App. 41A) Jenkins and McKenzie offered conflicting testimony as to the actions taken in the restroom. (Pet. App. 41A) Jenkins testified that Herring asked her and McKenzie to go into separate stalls and come out with their panties down. (Pet. App. 3A) Jenkins testified that she and McKenzie came out of the stalls with their panties around their ankles, then returned to the stalls and pulled their panties up.[1] McKenzie testified that neither she nor Jenkins ever exited the stalls with their panties down.[2] (Pet. App. 3A)

Herring and Sirmon took Jenkins, McKenzie and Jamerson to the office of the principal, Crawford Nelson.[3] (Pet. App. 4A) When Nelson asked the students to reveal the location of the money, Jamerson told Nelson that the money was located behind a file cabinet in their classroom. (Id.) A search behind the file cabinet failed to uncover the money. (Id.)

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[1] On one occasion, Jenkins testified that she was required to remove her dress in Sirmon's office.

[2] Both Jenkins and McKenzie kept their dresses on while they were in the restroom.

[3] Herring and Sirmon assert that this was the only visit to Nelson's office on May 1, 1992.

Jenkins and McKenzie allege that Herring and Sirmon took them back to the girls' restroom a second time. (Id.) A parent of another student testified that she stepped into the restroom and saw the girls, one in her panties and the other wearing a slip. Testimony offered by Jenkins and McKenzie is inconsistent with that of the parent who alleges she saw the girls in the restroom. Jenkins testified in her deposition that no one came into the restroom while she was in there with her dress off. (R3-74-Ex1-77) McKenzie testified that she did not see anyone walk by the restroom while she was in there. (R3-74-Ex2-57)

II. Board Findings and Findings of the Office for Civil Rights

After an investigation, the Talladega City Board of Education resolved to consider the cancellation of Herring's employment contract and suspended her pending action on the recommended termination. (Pet. App. 42A) After considering evidence submitted at Herring's termination hearing, the Board concluded that Jenkins and McKenzie had not been strip searched, but that Herring and Sirmon had exercised questionable judgment in handling the investigation. (Pet'r. C.A. App. 44-47, 55-58)

In September of 1992, the Office for Civil Rights investigated Jenkins' and McKenzie's allegations that they had been strip searched. In its Letter of Findings, OCR concluded that the evidence did not substantiate that Jenkins and McKenzie had been strip searched. (Pet'r C.A. App. 138-145) First Brief in Support of Motion for Summary Judgment, Evidentiary Attachments, pp.30- 37)

III. Procedural History

The parents of Jenkins and McKenzie filed a complaint on their behalf against the Talladega City Board of Education and nine individual defendants, including Herring and Sirmon. The complaint alleged that Jenkins and McKenzie had been strip

searched in violation of their Fourth and Fourteenth Amendment Rights and sought damages pursuant to 42 U.S.C. §1983.[4]

Herring and Sirmon moved for summary judgment on the basis of qualified immunity. Though the district court initially denied Herring and Sirmon qualified immunity (R2-27), the court subsequently reconsidered its decision. (R2-39) According to the district court:

> The law was not clearly established in the Eleventh Circuit with regard to the conduct at issue. There is no "bright line." There is no reasonable inference that these defendants were plainly incompetent or that they knowingly violated clearly established law. This court concludes that it over credited *Doe v. Renfrow*, 631 F.2d 91 (7th Cir. 1980), and a Supreme Court footnote.[5]

(R2-39) The district court granted summary judgment in favor of Herring and Sirmon on the basis of qualified immunity (R2-40).

A panel of the Eleventh Circuit Court of Appeals, over Judge Birch's strong dissent, reversed the district court and held that Fourth Amendment law was sufficiently clear in 1992 to put Herring and Sirmon on notice that their actions were unconstitutional. (Pet. App. 45A)

In his dissent, Judge Birch stressed his belief that, on May 1, 1992, "there was no binding, clearly established law that these school teachers violated in conducting the challenged strip

---

[4] The district court's dismissal of Jenkins' and McKenzie's several other claims was upheld by the court of appeals. (Pet. App. 4A) Jenkins and McKenzie do not seek review of those claims in this Court. (Pet. App. 4, n.3)

[5] The district court, in its reference to *Cornfield v. Consolidated High School Distr. #230*, 991 F.2d 1316 (7th Cir. 1993), suggested that *Doe v. Renfrow* had not clearly established the law at the time of the events giving rise to this action.

searches." (Pet. App. 73A) Judge Birch disagreed with the majority's reliance on *New Jersey v. T.L.O.*, 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985), "because *T.L.O.* is not factually similar to the strip searches that we review and cannot be clearly established law to resolve this case...." (Pet. App. 75A)

The Eleventh Circuit Court of Appeals decided to rehear the case en banc and vacated the previous panel's opinion. (Pet. App. 84A-85A) The en banc court held that Herring and Sirmon are entitled to qualified immunity because on May 1, 1992:

> [T]he law pertaining to the application of the Fourth Amendment to the search of students at school had not been developed in a concrete, factually similar context to the extent that educators were on notice that their conduct was constitutionally impermissible.

(Pet. App. 21A) The en banc court of appeals rejected the argument advanced by Jenkins and McKenzie that, on May 1, 1992, *New Jersey v. T.L.O.*, 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985), so clearly defined the law regarding the constitutionally permissible scope of a search of students that Herring and Sirmon were on notice that their conduct violated Jenkins' and McKenzie's rights under the Fourth Amendment. (Pet. App. 5A-6A) The court noted that Jenkins and McKenzie did not contest that "under the facts of this case, *T.L.O.* is the sole precedent that potentially could have clearly established the law for purposes of qualified immunity analysis." (Pet. App. 6A, n.1)

In concluding that *T.L.O.* did not clearly establish the law on student searches such that Herring and Sirmon were on notice that their conduct was constitutionally impermissible, the en banc court emphasized the general nature of the "reasonableness under all the circumstances" standard set forth in *T.L.O.* (Pet. App. 16A) The court noted that, although *T.L.O.* identifies factors to consider in defining the permissible scope of a school search, "there is no illustration, indication, or hint as to *how* the

enumerated factors might come into play when other concrete circumstances are faced by school personnel." (Pet. App. 9A-10A) The en banc court also noted the absence of "practical, fact based application" of the *T.L.O.* standard to facts materially similar to those of the search in this case: "School officials cannot be required to construe *general, legal formulations* that have not once been applied to a specific set of facts by any binding judicial authority." (Pet. App. 14A-16A) (Emphasis added.)

Finally, the en banc court opined that the absence from *T.L.O.* of a narrowly defined reasonableness test appears deliberate and "further suggests that *T.L.O.* did not attempt to establish clearly the contours of a Fourth Amendment right as applied to the wide variety of possible school settings different from those involved in *T.L.O.*" (Pet. App. 20A) The court held that *T.L.O.* did not clearly establish the law on student searches:

> Faced with a series of abstractions, on the one hand, and a declaration of seeming deference to the judgments of school officials, on the other, it is difficult to discern how *T.L.O.* could be interpreted to compel the conclusion that these defendants — or, more accurately, all reasonable educators standing in defendants' place — should have known that their conduct violated a clearly established constitutional right.

(Pet. App. 20A)

Judge Kravitch, joined by Chief Judge Hatchett and Judge Barkett, dissented. The dissent concluded that, despite *T.L.O.*'s general test, and in the absence of prior, factually similar cases, *T.L.O.* nonetheless would have made it obvious to Herring and Sirmon that their actions were unconstitutional. (Pet. App. 21A)

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I. THE ELEVENTH CIRCUIT COURT OF APPEALS' STANDARD FOR DETERMINING WHETHER THE LAW IS CLEARLY ESTABLISHED FOR QUALIFIED IMMUNITY PURPOSES DOES NOT CONFLICT WITH DECISIONS OF THIS COURT. FURTHER, THOUGH THERE IS SOME CONFLICT AMONG THE CIRCUITS AS TO THE RELEVANCE OF NON-BINDING PRECEDENT IN DETERMINING WHETHER THE LAW WAS CLEARLY ESTABLISHED, THE ELEVENTH CIRCUIT'S HOLDING IS NOT IN CONFLICT WITH THAT OF SEVEN OTHER CIRCUITS.

A. The Eleventh Circuit Court of Appeals' standard for determining whether the law is clearly established for qualified immunity purposes does not conflict with this Court's decision in *U.S. v. Lanier.*

The petitioners assert that the court of appeals employed "an overly expansive interpretation of qualified immunity" in concluding that the law pertaining to student searches had not been developed in a concrete, factually similar context so as to put educators on notice that their conduct was constitutionally impermissible. (Pet. App. 12) The petitioners argue that the level of factual specificity required by the Eleventh Circuit in determining whether the law was clearly established was rejected by this Court in *United States v. Lanier*, 117 S.Ct. 1219 (1997).[6]

[6] The petitioners also assert that the level of factual specificity required by the Eleventh Circuit is inconsistent with this Court's holding in *Anderson v. Creighton*, 483 U.S. 635 (1987). (Pet. App. 12) The respondents submit that the Eleventh Circuit's principles of qualified immunity fully comport with, and are based on, those set forth by this Court in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Mitchell v. Forsyth*, 472 U.S. 511 (1985); and *Anderson v. Creighton*, 483 U.S. 635 (1987). *See infra Point I.B.*

Lanier involved a challenge to a criminal conviction under 18 U.S.C. §242, the criminal law counterpart to 42 U.S.C. §1983. 73 F.3d 1380. In *Lanier*, a judge's conduct in sexually assaulting several women was alleged to give rise to a criminal civil rights violation. (Id.) In an en banc decision, the Sixth Circuit reversed the judge's criminal conviction, concluding that 18 U.S.C. §242 did not provide adequate notice that sexual assault by a state actor fell within the scope of constitutionally prohibited conduct. *Lanier*, 73 F.3d 1380, 1384 (6th Cir. 1996) (en banc). The Sixth Circuit held that "a generally phrased constitutional right" has been "made specific" only if a prior decision of the Supreme Court has declared the right, and then only when the Supreme Court has applied its ruling in a case with facts "fundamentally similar to those being prosecuted." 73 F.3d at 1393.

This Court granted certiorari "to review the standard for determining whether particular conduct falls within the range of criminal liability under §242." *Lanier*, ___ U.S. ____, ____, 117 S.Ct. 1219, 1224. In *Lanier*, the Court rejected the glosses added by the Sixth Circuit, specifically, that a prior decision of the Supreme Court must have declared a right and that the Supreme Court must have applied its ruling declaring such right in a case with facts fundamentally similar to the case at issue. The Court also concluded that the "made specific" standard is essentially the same as the clearly established standard employed in qualified immunity cases rather than the heightened standard set forth by the court of appeals.. *Lanier*, ___ U.S. at ____, 117 S.Ct. at 1227-28.

The petitioners assert that the standard employed by the Eleventh Circuit Court of Appeals in determining whether the law was clearly established for qualified immunity purposes is "essentially identical" to the "made specific" standard set forth by the Sixth Circuit Court of Appeals in *Lanier*. This assertion is plainly false. The Eleventh Circuit does not require, in order that the law be clearly established, that a prior decision of the

Supreme Court have declared the right at issue and that the Supreme Court have applied its ruling on such right in a case with facts fundamentally similar to the case before the court. The Eleventh Circuit simply does not employ this heightened standard. Because the Eleventh Circuit does not employ the standard rejected by this Court in *Lanier*, there can be no conflict between the Eleventh Circuit and *Lanier* in this regard.

The petitioners also argue that the Eleventh Circuit's requirement that, for the law to be clearly established, prior law must have been developed in a concrete and factually defined context, conflicts with this Court's holding in *Lanier*. (Pet. App. 13) *Lanier*, in equating the "made specific" standard and the "clearly established" standard, stated that criminal liability may be imposed for deprivation of a constitutional right "if, but only if, in light of preexisting law, the unlawfulness under the Constitution is apparent." *Lanier*, ___ U.S. at ____, 117 S.Ct. at 1227-28. This statement is consistent with this Court's decisions in the qualified immunity context. See *Anderson v. Creighton*, 483 U.S. 635, 97 L.Ed.2d 523, 107 S.Ct. 3034 (1987). The Eleventh Circuit's standard for determining whether the law is clearly established for qualified immunity purposes, based on this Court's qualified immunity decisions, in no way differs from the standard set forth in Lanier. As such, there is no conflict.

To the extent the petitioners argue that this Court's commentary in *Lanier* regarding general propositions of law displaces this Court's rulings in its qualified immunity decisions, such argument also fails. In *Lanier*, the Court stated:

> General statements of the law are not inherently incapable of giving fair and clear warning, and, in other instances, a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful.'

Lanier, ___ U.S. at ____, 117 S.Ct. at 1227. The Eleventh Circuit Court of Appeals' standard for determining whether the law is clearly established for qualified immunity purposes is not inconsistent with these comments.

The Eleventh Circuit's standard for determining whether the law is clearly established, based on this Court's decisions in the qualified immunity context, does not require that the *very action in question* previously have been held unlawful. *Lanier*, 117 S.Ct. 1219, 1227. The Eleventh Circuit's standard is commensurate with this Court's holding in *Anderson v. Creighton*, which requires:

> The right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: the contours of the right must be sufficiently clear that a reasonable official would understand that what he was doing violates the right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . but it is to say that in light of preexisting law, the unlawfulness must be apparent.

Anderson v. Creighton, 483 U.S. 635, 640. See *Lassiter v. Alabama A&M Univ.*, 28 F.3d 1146 (11th Cir. 1994) (en banc).

The Eleventh Circuit's requirement that prior case law must be "particularized" and must make the unlawfulness of the conduct at issue apparent fully comports with this Court's decision in *Anderson*. The principles set forth in *Anderson* are the very principles addressed in *Lanier*. As such, it cannot be said that the en banc court's qualified immunity standard is contrary to the spirit or the letter of *Lanier*."[7]

[7] As this Court noted in *Lanier*, "In some circumstances, as when an earlier case expressly leaves open whether a general rule applies to the particular type of conduct at issue, a very high degree of prior factual particularity may

(Footnote 7 continued on next page)

The petitioners also attempt to fashion a conflict with this Court's decision in *Lanier* by asserting that the Eleventh Circuit's approach to assessing whether the law is clearly established is "in tension" with this Court's approach as set forth in *Lanier*. (Pet. App. 15) Contrary to the argument advanced by petitioners, the Eleventh Circuit's holding that "the law can be 'clearly established' for qualified immunity purposes only by decisions of the U.S. Supreme Court, Eleventh Circuit Court of Appeals, or the highest court of the state" (Pet. App. 14A, n.4) (citing *Hamilton v. Cannon*, 80 F.3d 1525, 1532, n.7 (11th Cir. 1996); *Courson v. McMillan*, 939 F.2d 1479, 1497-1498, n.32 (11th Cir. 1991) does not conflict with this Court's holding in *Lanier*.

The petitioners argue that *Lanier* rejects a rule, such as that employed by the Eleventh Circuit, prohibiting consideration of decisions of other courts of appeals or other courts in determining whether the law has been clearly established. In *Lanier*, this Court specifically rejected the Sixth Circuit's holding that only Supreme Court precedent could "make specific" the law for purposes of 18 U.S.C. §242 and that no other decisions could be considered. *Lanier* did not address the extent to which decisions of other courts must, should, or may be considered in determining whether the law has been clearly established.[8] (Pet. App. n.4)

(Footnote 7 continued)

be necessary." *Lanier*, ___ U.S. at ____, 117 S.Ct. at 1227 (citing *Mitchell v. Forsyth*, 472 U.S. 411 (1985)). Such is precisely the case the en banc court was confronted with in considering the permissible scope of student searches under *New Jersey v. T.L.O.* The "reasonableness under the circumstances" standard set forth in *T.L.O.* expressly left open the question whether a search of a student accused of stealing money would violate the Constitution. As such, the Eleventh Circuit sought a higher degree of prior factual particularity.

[8] In *Harlow*, this court did not address "the circumstances under which 'the state of the law' should be 'evaluated' by reference to the opinions of this Court, of the Courts of Appeals, or of the local District Court." *Harlow v. Fitzgerald*, 457 U.S. 818, n.32 (quoting *Procunier v. Navarette*, 434 U.S. 565, 55 L.Ed.2d 24, 98 S.Ct. 855 (1978))

Further, the *Lanier* Court did not conclude that there was any impropriety in considering only the decisions of the circuit or the highest court of the state in which the relevant events took place. (Pet. App. n.4) As such, there is no tension between the en banc court's holding as to the precedent it will consider and the precedent addressed in *Lanier*.

Because the Eleventh Circuit Court of Appeals' en banc holding does not conflict with *Lanier*, there is no basis for the granting of certiorari on this issue.

B. The Eleventh Circuit Court of Appeals' standard for determining whether the law is clearly established comports with this Court's decisions concerning qualified immunity.

The petitioners assert that the Eleventh Circuit's standard for determining whether the law is clearly established in the qualified immunity context "seriously misconstrues this Court's qualified immunity decisions." (Pet. App. 11) The petitioners submit that the Eleventh Circuit requirement that case law "establish the right in concrete, factually defined circumstances that are materially similar to the case at hand" is improper. (Pet. App. 11) The en banc court's holding fully comports with this Court's qualified immunity decisions.

In *Harlow v. Fitzgerald*, this Court held:

> [I]f the law at the time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law *forbade* conduct not previously identified as unlawful.

475 U.S. 800, 818 (1982) (Emphasis added.)

In *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985), this Court emphasized that the *Harlow* court "refashioned" the doctrine of qualified immunity such that

immunity would be an entitlement to government officials "where the legal norms the officials are alleged to have violated were not clearly established at the time." 472 U.S. 526 According to this Court, the question of qualified immunity is a truly legal one: whether the legal norms allegedly violated were clearly established at the time of the challenged actions or whether the law *clearly proscribed* the actions at issue. 472 U.S. 528 (Emphasis added.)

This Court, in *Anderson v. Creighton*, addressed the degree of factual specificity necessary to clearly establish the law:

> The operation of this standard, however, depends substantially upon the level of generality at which the relevant "legal rule" is to be identified. For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates the Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation. But if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of *Harlow*. Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights. *Harlow* would be transformed from a guarantee of immunity into a rule of pleading.

Anderson at 639. *Anderson* made clear that "the right the official is alleged to have violated must have been "clearly established" in a more *particularized,* and hence more relevant, sense." 483 U.S. at 640. (Emphasis added.) As this Court stated in *Anderson*, "[T]he contours of the right must be sufficiently clear that a reasonable official would understand that what he was doing violates the right." *Id.* While *Anderson* does not require that "the

very action in question" be previously held unlawful, "in the light of pre-existing law, the unlawfulness must be apparent." *Id.*

The principles of qualified immunity set forth by the Eleventh Circuit Court of Appeals in *Lassiter v. A&M Univ.*, 28 F.3d 1146 (11th Cir. 1994) (en banc) and *Adams v. St. Lucie County Sheriff's Dept.*, 962 F.2d 1563 (11th Cir. 1992) (Edmondson, J. dissenting) (adopted en banc 998 F.2d 923 (11th Cir. 1993)) (per curium) fully comport with and are based on those principles espoused by this Court. In *Lassiter*, the Eleventh Circuit, citing *Anderson v. Creighton*, stated:

> For the law to be clearly established to the point that qualified immunity does not apply, the law must have earlier been developed in such a concrete and factually defined context to make it obvious to all reasonable government actors, in the defendant's place, that 'what he is doing violates federal law.

Lassiter v. Alabama A&M Univ., at 3116 (citing *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987). The court of appeals in *Lassiter* emphasized that, "[W]hen considering whether the law applicable to certain facts is clearly established, the facts of the cases relied upon as precedent are important." *Lassiter* at 3116. Though the Eleventh Circuit does not require the facts to be identical to the facts of the case before it, the Court does require that the facts be "materially similar." *Id.*

The principles employed by the Eleventh Circuit Court of Appeals in determining the availability of qualified immunity fully comport with this Court's decisions in the qualified immunity context. The Eleventh Circuit's qualified immunity standard does not require "a level of factual specificity in the articulation of a constitutional right that this Court has rejected." Based on the foregoing, it is evident that the Eleventh Circuit Court of Appeals' standard for determining whether the law is clearly established fully comports with this Court's decisions

concerning qualified immunity. As such, there is no basis for the granting of certiorari on this issue.

C. Though there is some conflict among the circuits as to the relevance of NON-BINDING precedent in determining whether the law was clearly established, the Eleventh Circuit's holding is not in conflict with that of seven other circuits.

The petitioners argue that the Eleventh Circuit's holding with regard to the relevance of non-binding authority in determining whether the law is clearly established conflicts with decisions of seven other circuits in that the Eleventh Circuit precludes the consideration of NON-BINDING precedent as relevant authority. According to the petitioners, the Second, Fifth and Eleventh Circuits hold that only binding precedent should be consulted. (Pet. App. 16) This argument necessarily fails because the Eleventh Circuit *does* consult non-binding precedent in the qualified immunity context. Except in matters concerning state law, decisions of the highest court of the state where a case arises are not binding on the Eleventh Circuit Court of Appeals. Nonetheless, in *Courson v. McMillan*, 939 F.2d 1479, 1497-98, n.32 (11th Cir. 1991), the Eleventh Circuit included these state court decisions among those decisions relevant to its clearly established law analysis. As such, the Eleventh Circuit's holding does not conflict with the decisions of seven other circuits.[9]

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[9] There is a question as to whether petitioners' arguments in this respect are properly raised here. As the en banc court concluded,

> The parties agree that, at the time the events giving rise to this action occurred, *T.L.O.* was the only case that had addressed with any specificity the Fourth Amendment implications of school searches. As a result, it is uncontested that, under the facts of this case, *T.L.O.* is the sole precedent that potentially could have clearly established the law for purposes of qualified immunity analysis.

(Pet. App. 6A, n.1)

Though the petitioners argue that there is a "sharp and genuine circuit conflict" on the issue of relevant decisions, they fail to establish that the application of different standards among the circuits has made any significant difference in the outcome of relevant decisions. The petitioners assert that, as of May 1992, the decisions from other jurisdictions concerning school searches, taken together, made clear the petitioners' rights in this case. (Pet. App. 18) According to the petitioners, "Under the standard of virtually any other Circuit but the Eleventh, Second, and Fifth, respondents in this case would not have been entitled to qualified immunity." *Id.* This assertion is both speculative and unfounded.

The petitioners argue that had the Eleventh Circuit considered non-binding precedent as relevant, respondents in this case would not have been granted qualified immunity. *Id.* As stated above, the Eleventh Circuit does consider NON-BINDING precedent as relevant in the qualified immunity context. Nonetheless, the Eleventh Circuit's consideration of non-binding precedent would not necessarily result in a denial of qualified immunity to the respondents. Further, the same might be true of the First Circuit. In *Bonitz v. Fair*, 804 F.2d 164 (1st Cir. 1986), the First Circuit held that it was not limited to Supreme Court cases in determining whether the law was clearly established. *Bonitz* at 171, n.8. The Court noted that it can consider opinions of the courts of appeals and of the local District Court. *Id.* Given the First Circuit's preclusion of certain non-binding precedent, namely, state law, it does not follow that under this Court of Appeals' standard "respondents in this case would not have been entitled to qualified immunity." Further, while a decision might be relevant to a court's qualified immunity analysis, such decision will not necessarily clearly establish the law.[10] Because the petitioners are unable to establish that the Eleventh Circuit is in

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[10] For example, a non-binding decision might not be factually similar to the case before a court.

conflict with seven others, and because they are unable to show that the application of different standards among the circuits has had a significant impact on resultant cases, the issuance of a writ of certiorari is not warranted.

D. To the extent the petitioners seek to have this Court speak to the merits of this case, such is not properly before this Court.

The petitioners submit that clarification of the qualified immunity standards at issue is "of substantial importance to the enforceability of constitutional rights." (Pet. App. 19) The respondents submit that such argument is not appropriately before this Court.

Qualified immunity is "conceptually distinct" from the merits of the petitioners' claims that their rights have been violated. *Mitchell v. Forsyth*, 472 U.S. 511, 86 L.Ed. 411, 105 S.Ct. 2806. Because the only question before the Eleventh Circuit was the qualified immunity issue, not the merits of the case, presentation of an argument on the merits is improper.[11]

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[11] Even if this argument were properly before the Court (that courts will seldom reach the question of whether conduct was unconstitutional), the respondents submit that the petitioners' assertion is not persuasive. Public officials sued in their individual capacities may fail to raise the defense of qualified immunity, a board of education might be named the sole defendant in a lawsuit, school personnel might be sued in their official capacities only, and trial judges might refuse to certify qualified immunity questions for immediate appeal.

II. THE EN BANC COURT OF APPEALS' HOLDING THAT *NEW JERSEY V. T.L.O.* DID NOT CLEARLY PROSCRIBE THE ACTIONS OF HERRING AND SIRMON SUCH THAT THEY SHOULD BE STRIPPED OF QUALIFIED IMMUNITY DOES NOT CONFLICT WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS.

A. The en banc decision of the Eleventh Circuit Court of Appeals does not conflict with *New Jersey v. T.L.O.*

The en banc court of appeals held that on May 1, 1992, "The law pertaining to the application of the Fourth Amendment to the search of students at school had not been developed in a concrete, factually similar context to the extent that educators were on notice that their conduct was constitutionally impermissible." (Pet. App. 21A) The en banc court rejected the argument, raised here by petitioners, that *New Jersey v. T.L.O.* clearly defined the law regarding the constitutionally permissible scope of student searches such that the respondents were on notice that their conduct violated petitioners' rights. (Pet. App. 5A-6A)[12]

It is important to note at the outset that the facts in *T.L.O.* are not remotely factually similar to those faced by the en banc court. *T.L.O.* involved juvenile proceedings relating to evidence gleaned on a search of T.L.O.'s purse by school officials. T.L.O., a high school student, was accused of violating a school rule prohibiting smoking in the restroom. The case at hand involves the alleged strip search of two elementary school students accused of stealing seven dollars. The facts of *T.L.O.* are too different from the case at hand to have put the respondents on notice that their actions were unlawful.

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[12] The Eleventh Circuit noted in its opinion that petitioners did not contest that "under the facts of this case, *T.L.O.* is the sole precedent that potentially could have clearly established the law for purposes of qualified immunity analysis." (Pet. App. 6A, n.1)

In *T.L.O.*, this Court held that the Fourth Amendment's prohibition on unreasonable searches and seizures applies to searches conducted by school officials. 469 U.S. 325 at 333. This Court made clear, however, that its application was somewhat diluted in that certain of the restrictions usually applicable to searches conducted by public officials would be eased. Specifically, the Court ruled that school officials would not be required to obtain warrants in order to search students, nor would they be required to base searches on probable cause. *Id.* at 340-341. This Court reasoned that the legality of the student search should depend on the "reasonableness under all the circumstances" of the search. *Id.* at 341.

The *T.L.O.* court set forth a test for determining the reasonableness of a search:

> [F]irst, one must consider whether the . . . action was justified at its inception; second, one must determine whether the search as actually conducted was reasonably related in scope to the circumstances which justified the interference in the first place.

Id. at 341. A search is "justified at its inception" where a school official has reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating the law or school rules. *Id.* at 341-42. A search is permissible in scope where the measures adopted are reasonably related to the objectives of the search and are not too intrusive in light of the age and sex of the student and the nature of the infraction. *Id.* at 342.

In concluding that *T.L.O.* did not clearly establish the law on student searches such that Herring and Sirmon were on notice that their conduct was constitutionally impermissible, the en banc court emphasized the general nature of the "reasonableness under all the circumstances" standard set forth in *T.L.O.* (Pet. App. 16A) Although *T.L.O.* identifies factors to consider in

defining the permissible scope of a school search, "there is no illustration, indication, or hint as to *how* the enumerated factors might come into play when other concrete circumstances are faced by school personnel." (Pet. App. 9A-10A) The en banc court also noted the absence of "practical, fact based application" of the *T.L.O.* standard to facts materially similar to those of the search in the present case.

The absence from *T.L.O.* of a narrowly defined reasonableness test appears deliberate and "further suggests that *T.L.O.* did not attempt to establish clearly the contours of a Fourth Amendment right as applied to the wide variety of possible school settings different from those involved in *T.L.O.*" (Pet. App. 20A) *T.L.O.* did not clearly establish the law on student searches:

> Faced with a series of abstractions, on the one hand, and a declaration of seeming deference to the judgments of school officials, on the other, it is difficult to discern how *T.L.O.* could be interpreted to compel the conclusion that these defendants — or, more accurately, all reasonable educators standing in defendants' place — should have known that their conduct violated a clearly established constitutional right.

(Pet. App. 20A) Justice Stevens speaks to this in his dissent in *T.L.O.*:

> The court's effort to establish a standard that is, at once, clear enough to allow searches to be upheld in nearly every case, and flexible enough to prohibit obviously unreasonable intrusions of young adults privacy, only creates uncertainty in the extent of its resolve to prohibit the latter.

469 U.S. 325 at 381. Stevens, J. concurring in part and dissenting in part. Justice Brennan also referred to the reasonableness standard as "unclear" and "unguided balancing test" and "amorphous balancing test" and a "cursory and short sighted test."

T.L.O. at 363-370 (Brennan, J. concurring in part and dissenting in part.) Justice Brennan predicted that "the reasonableness under all the circumstances test will leave teachers and administrators uncertain as to their authority and will encourage excessive fact-based litigation." *Id.* at 367.

The reasonableness under all the circumstances test set forth in *T.L.O.* is nothing more than an abstract, general proposition which provides absolutely no instruction to school officials as to the permissible scope of student searches. *T.L.O.*'s application of this standard does nothing more than given an example of what *might* constitute a *reasonable* search in the school setting.

Finally, it is relevant that other circuits have also concluded that *T.L.O.* did not clearly establish Fourth Amendment law on student searches. In *Williams v. Ellington*, 936 F.2d 881 (6th Cir. 1991), the Sixth Circuit commented that "the reasonableness standard articulated in *New Jersey v. T.L.O.* has left courts later confronted with the issue either reluctant or unable to define what type of official conduct would be subject to a 42 U.S.C. §1983 cause of action." In 1993, the Seventh Circuit — the same court that decided *Doe v. Renfrow*, 631 F.2d 991 (7th Cir. 1980), *cert. denied*, 451 U.S. 1022 (1981), commented on "the nebulous standards governing student searches." *Cornfield by Lewis v. Consolidated School District No. 230*, 991 F.2d 1316, 1327 (7th Cir. 1993). Further, if *T.L.O.* had clearly established the law on *all* student searches, there would have been no need for the Supreme Court to decide in 1995, in *Vernonia School District 47J v.. Acton*, 515 U.S. ___, 115 S.Ct. 2386 (1995) that a school district's policy authorizing urinalysis drug testing of student athletes did not violate the Fourth Amendment.

In its en banc decision, the Eleventh Circuit, pursuant to the qualified immunity principles espoused by this Court, concluded that *T.L.O.* did not clearly establish the law on student searches such that the respondents should be stripped of quali-

fied immunity. The court's finding that the law was not clearly established does not conflict with *T.L.O.* because the facts in the cases are completely different. Further, the general nature of the reasonableness under all the circumstances standard set forth in *T.L.O.*, coupled with a complete lack of factual similarity, precludes a finding of clearly established law. While *T.L.O.* identifies factors an official is to consider in defining the scope of a student search, *T.L.O.* does not demonstrate how said factors might come into play in different circumstances. Because the Eleventh Circuit was appropriate in its determination that *T.L.O.* did not clearly establish the law, and because this determination cannot be said to constitute a conflict, none can be said to exist between the Eleventh Circuit and this Court. It follows that there is no basis for the granting of certiorari on this issue.

B. The Eleventh Circuit's decision does not conflict with decisions of the Sixth and Seventh Circuits or the Supreme Court of West Virginia.

The petitioners argue that decisions from the Sixth and Seventh Circuits and the Supreme Court of West Virginia conflict with the en banc decision in that decisions of these courts recognize a clearly established right of students not to be strip searched for minor infractions. (Pet. App. 27-28) This argument fails for several reasons.

First, none of the decisions cited by the petitioners are even *remotely* factually similar to the present case. In *Doe v. Renfrow*,[13] after the entire student body was subjected to drug detecting canines and a dog alerted to her, one of the plaintiffs was searched by school officials. 631 F.2d 91-92 (7th Cir. 1980). In *Cornfield* v. *Consolidated High School Distr. No. 230.*, a sixteen

[13] *Doe v. Renfrow*, a 1980 case, cannot be said to have clearly established the law on student searches. This case was decided five years before *T.L.O.*, at which time there was a question as to whether the Fourth Amendment applied to student searches at all.

year old student was suspected of crotching drugs. Despite the refusal of the student's parent to consent to a strip search, two male school officials conducted the search. 991 F.2d 1316, 1319 (7th Cir. 1993) In *Williams* v. *Ellington*, a female high school student suspected of using drugs was subjected to a strip search by a female school official. 936 F.2d 881, 883 (6th Cir. 1991) Finally, in *State ex rel. Galford v. Mark Anthony B.*, a fourteen year old male accused of theft was subjected to a search. 433 S.E.2d 41, 42-43 (W.Va. 1993) In *Galford*, no one implicated the student in the theft — the school social worker happened upon information that the student had been in the classroom where the money was stolen. *Id.* at 42.

While the petitioners assert that these decisions recognize a clearly established right of students not to be strip searched for minor infractions, such is not the case. The strip search in *Doe* was struck down because it was executed without any individualized suspicion and without reasonable cause. *Doe* at 92. See *Cornfield v. Consolidated* at 1324. ("Our sharp condemnation of the conduct of the school officials in [*Doe*] stems from the fact that the strip search of Doe was executed without any individualized suspicion and without reasonable cause.") The strip search in *Cornfield* was deemed reasonable in that it was justified at its inception because there were enough personal observations to create a reasonable suspicion that the student was crotching drugs. The search was permissible in scope because, although the student was sixteen and more self-conscious, two males performed the search, and the search was conducted in the boy's locker room where no one saw him and there was no touching.[14] *Cornfield* at 1323. The search of the high school

[14] The court in *Cornfield* commented that a school board would not be held accountable for a failure to train its employees with respect to student searches. According to the court, "Given the nebulous standards governing student searches, school districts and school district administrators cannot be held accountable on this ground because the particular constitutional duty at issue is not clear." *Cornfield* at 1327.

female suspected of using drugs by a female school official at issue in *Williams* was upheld as reasonable. In *Williams*, the court looked to the school's search policy, which provided:

> [A] pupil's person will not be searched unless there is a reasonable suspicion that the pupil is concealing evidence of an illegal act . . . . When a pupil's person is searched, the person conducting the search shall be the same sex as the pupil; and a witness of the same sex shall be present during the search.

Id.[15] In *Galford*, the search of a fourteen year old male suspected of theft, where no one implicated the student, was deemed unreasonable.[16]

The above cases cannot be said to have put the respondents on notice that their actions on May 1, 1992, violated the Constitution. Only *Doe* and *Williams* had been decided in May 1992, and neither involved a search of an elementary school student suspected of theft. To the extent the petitioners argue the above cases should have compelled the Eleventh Circuit to conclude the respondents' actions were unconstitutional, such argument

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[15] The *Williams* court noted:

> [A] diligent but unsuccessful search for additional guidance from the designated jurisdictional pool leads us to a troubling conclusion: the reasonableness standard articulated in *New Jersey v. T.L.O.* has left courts later confronted with the issue either reluctant or unable to define what type of official conduct would be subject to a 42 U.S.C. §1983 cause of action.

Williams at 886. The *Williams* court also emphasized the *T.L.O.* court's attention to protecting the right of school officials to make discretionary decisions. *Id.*

[16] In *Galford*, the Supreme Court of West Virginia commented that "the United States Supreme Court has never decided a case which involved a strip search of students, nor did the *T.L.O.* court indicate whether its reasonableness standard would apply to strip searches of students." *Galford* at 45.

necessarily fails because not one of the above cases is even remotely factually similar to the present case. The Eleventh Circuit reached a conclusion based on the facts before it and the law in existence in May of 1992. Such does not represent a conflict with the Sixth and Seventh Circuits or the Supreme Court of West Virginia. As such, there is no basis for the granting of certiorari on this issue.

CONCLUSION

Based upon the foregoing, respondents Susannah Herring and Melba Sirmon respectfully request that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1997

CASSANDRA JENKINS, a minor by her mother
SANDRA HALL, and
ONEIKA McKENZIE, a minor, by her mother
ELIZABETH McKENZIE, *Petitioners*,

v.

SUSANNAH HERRING and MELBA SIRMON,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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13pp

TABLE OF CONTENTS

Page

Table of Authorities ii

Reasons for Granting the Writ 1

Conclusion 10

TABLE OF AUTHORITIES

Anderson v. Creighton, 483 U.S. 635 (1987) 7

Bellnier v. Lund, 438 F. Supp. 47 (N.D.N.Y. 1977) 5

Bilbrey v. Brown, 738 F.2d 1462 (9th Cir. 1984) 5

Courson v. McMillian, 939 F.2d 1479 (11th Cir. 1991) 3

Doe v. Renfrow, 631 F.2d 91 (7th Cir. 1980) (*per curiam*), *cert. denied*, 451 U.S. 1022 (1981) 5

Elder v. *Holloway*, 510 U.S. 510 (1994) 5, 6

State ex rel. Galford v. Mark Anthony B., 433 S.E.2d 41 (W. Va. 1993) 5

Hamilton v. Cannon, 80 F.3d 1525 (11th Cir. 1996) 3

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 3, 6

Lassiter v. Alabama A & M Univ., 28 F.3d 1146 (11th Cir. 1994) (en banc) 8

Lebron v. National R.R. Passenger Corp., 513 U.S. 374 (1995) 5, 6-7

Mitchell v. Forsyth, 472 U.S. 511 (1985) 8, 9

Monell v. Department of Social Services, 436 U.S. 658 (1978) 2

New Jersey v. T.L.O, 469 U.S. 325 (1985) ..... *passim*

Oliver v. McClung, 919 F. Supp. 1206 (N.D. Ind. 1995) ... 5

Tarter v. Raybuck, 742 F.2d 977 (6th Cir. 1984), *cert. denied*, 470 U.S. 1051 (1985) 5

United States v. Lanier, 117 S. Ct. 1219 (1997) .... *passim*

In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-381

CASSANDRA JENKINS, a minor by her mother
SANDRA HALL, and
ONEIKA MCKENZIE, a minor, by her mother
ELIZABETH MCKENZIE, *Petitioners*

v.

SUSANNAH HERRING and MELBA SIRMON

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

Respondents' brief in opposition only confirms that this case warrants this Court's review. First, respondents acknowledge that there is a circuit conflict on the issue of which jurisidictions' precedents are to be considered in a qualified immunity case to determine whether the law was "clearly established." Second, respondents do not question our observations (Pet. 22-24) that every court that has upheld even a partial strip search in a school setting dealt with a search for weapons or other dangerous contraband, and that every court reviewing a strip search for items not posing any imminent risk of serious harm, such as money, has held the search to be

unconstitutional. Instead, respondents suggest that we have waived reliance on any cases other than *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), that support our contention that petitioners' rights were clearly established. There is no factual or legal basis for that suggestion.

Third, respondents unsuccessfully attempt to reconcile the decision below with *United States v. Lanier*, 117 S. Ct. 1219 (1997), by misconstruing *Lanier*'s core holding. The court of appeals' insistence that only factually specific, similar precedents can clearly establish the law cannot be squared with *Lanier*'s recognition that even cases with "notable factual distinctions" from the case before the court can clearly establish the law. *Id.* at 1227. Fourth, the factual differences between *T.L.O.* and this case do not negate the conclusion that *T.L.O.* plainly prohibits teachers' precipitate and repeated strip searches of eight-year-old students in search of seven dollars that another student reported missing.[1] Under respondents' interpretation of *T.L.O.*, no school search, no matter how

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[1] Respondents seek to downplay the detrimental impact of the court of appeals' standard on the enforceability of constitutional rights by speculating that the contours of students' Fourth Amendment rights might become more clearly defined in cases in which school officials "fail to raise the defense of qualified immunity," Br. in Opp. 17 n.11, but enforceability of constitutional rights should not have to turn on defendants' defaults. Respondents also suggest that constitutional standards could develop in cases against school boards, but claims against governmental entities under 42 U.S.C. 1983 require a showing that the constitutional violation resulted from an official policy or custom. *See Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978). Such cases thus cannot clarify *T.L.O.*'s application to the typical strip search case, in which no governmental policy or custom is involved.

extreme or intrusive, would warrant a finding of liability. They maintain that "*T.L.O.* is nothing more than an abstract, general proposition which provides absolutely no instruction to school officials as to the permissible scope of student searches." Br. in Opp. 21. Certiorari should be granted in this case to dispel that notion.

1. Respondents concede (Br. in Opp. 15) that there is "some conflict" among the circuits on the question of which courts' decisions are relevant to the determination whether the law is clearly established under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Their suggestion (Br. in Opp. 15-17) that the decision below does not squarely conflict with the decisions of the First, Third, Sixth, Seventh, Eighth, Ninth and Tenth Circuits, is based on a syllogism. Respondents point out that the Eleventh Circuit considers some "nonbinding" precedent, as do decisions of seven other circuits we identified as conflicting with the decision below. *Id.* The only nonbinding precedents the Eleventh Circuit considers, however, are the decisions of the highest court of the state in which the case arose.[2] The seven other circuits, in contrast, consider

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[2] The petition stated that the Eleventh Circuit looks only to "binding" precedent, *see* Pet. 11, 16, but that characterization is admittedly an inadvertent oversimplification. The court of appeals on occasion also looks to the (nonbinding) decisions of the highest court of the state in which the claim arose. *See* Pet. 14-15; *Hamilton v. Cannon*, 80 F.3d 1525, 1531-1532 n.7 (11th Cir. 1996); *Courson v. McMillian*, 939 F.2d 1479, 1498 n. 32 (11th Cir. 1991) (holding that "clearly established law in this circuit may include decisions of the highest state court in states that comprise this circuit as to those respective states, when the state supreme court has addressed a federal constitutional issue that has not been addressed by the United States Supreme Court or the Eleventh Circuit").

nonbinding decisions from other jurisdictions, including other circuits, and, in some cases, decisions of district courts, and of state courts outside of the state where the case arose. *See* Pet. 16-18 (discussing cases). The decision below thus embraces a rule to which no other court adheres, and that is materially in conflict with decisions of at least seven other circuits.[3]

Respondents erroneously suggest that the application of a different standard would not have affected the result in this case because the precedents the court of appeals declined to consider "[do] not necessarily clearly establish the law." Br. in Opp. 16. As we contended in the petition, however, "the decided school search cases from other jurisdictions as of May 1992, taken together, certainly made petitioners' rights clear." Pet. 18; *see id.* at 26-27. If the cases from other jurisdictions had been considered, it would have been evident that respondents should not have been afforded qualified immunity.

2. Respondents assert (Br. in Opp. 5, 15 n.9, 18 n.12) that we have conceded that *T.L.O.* is the sole precedent that could have clearly established the law. That assertion does not detract from the certworthiness of this case. First, we made no such concession. Second, even if we had, it would not amount

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[3] Indeed, respondents' brief points out that the conflict is even more pervasive than we asserted in the petition. *See* Pet. 18 (describing the Second and Fifth Circuits as substantially in agreement with the Eleventh Circuit). As respondents note (Br. in Opp. 15), the Eleventh Circuit's standard is unique; while the Second and Fifth Circuits consider only this Court's and their own circuit precedents, the Eleventh Circuit also considers decisions of the highest court of the state where the case arose.

to a waiver and would have no effect on this Court's ability to consider all relevant cases in support our claim. *See Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995); *Elder* v. *Holloway*, 510 U.S. 510 (1994).

Petitioners repeatedly and consistently have relied on lower court cases, as well as on *T.L.O.*, to support the contention that petitioners' rights were clearly established. *See* Pet. 26-29 (citing cases). In the briefs to the court of appeals panel, petitioners cited other relevant cases in addition to *T.L.O. See, e.g.*, Pet'r C.A. Br. 20-21 & n.6 (citing *Doe v. Renfrow*, 631 F.2d 91 (7th Cir. 1980) (*per curiam*), *cert. denied*, 451 U.S. 1022 (1981); *Bilbrey v. Brown*, 738 F.2d 1462 (9th Cir. 1984)). Before the *en banc* court, petitioners continued to assert the relevance of school search cases other than *T.L.O. See, e.g.*, Pet'r En Banc C.A. Br. 22 n.10, 27 n.13, 35 (citing *Doe v. Renfrow*, 631 F.2d 91; *Tarter v. Raybuck*, 742 F.2d 977 (6th Cir. 1984), *cert. denied*, 470 U.S. 1051 (1985); *Oliver v. McClung*, 919 F. Supp. 1206 (N.D. Ind. 1995); *Bellnier v. Lund*, 438 F. Supp. 47 (N.D.N.Y. 1977); *State ex rel. Galford v. Mark Anthony B.*, 433 S.E.2d 41 (W. Va. 1993). There is thus no basis for respondent's suggestion that we have somehow waived reliance on cases other than *T.L.O.*[4]

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[4] The court of appeals concluded that the parties "agree[d]" that *T.L.O.* was the only relevant school-search case and thus was "the sole precedent that could have clearly established the law for purposes of qualified immunity analysis." Pet. App. 6a n.1. Because the court states that conclusion without citation to the record, we do not know what comment the court might have been construing as manifesting our "agreement." In any event, the court's conclusion must be viewed in light of that court's rule limiting the universe of relevant cases. In stating that petitioners had identified no relevant case other than *T.L.O.*, the court of appeals was governed

Even if we had failed in the lower courts to identify relevant cases other than *T.L.O.*, no estoppel or waiver would have resulted. Rather, we could nonetheless raise, and this Court could rely on, any cases tending to show that petitioners' rights were clearly established. As this Court unanimously held in *Elder v. Holloway*, "appellate review of qualified immunity dispositions is to be conducted in light of all relevant precedents, not simply those cited to, or discovered by," the lower courts. 510 U.S. at 512.[5] Thus, any failure in the lower courts to identify cases that help to clearly establish the law does not affect our ability to identify such cases now. Indeed, even an affirmative disavowal of reliance on any cases other than *T.L.O.* would not have affected our ability to rely on additional cases in this Court. *See Lebron v. National R.R.*

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by its own rule that only cases from this Court, the Eleventh Circuit itself and the highest court in the state where the case arose can "clearly establish" a right within the meaning of *Harlow v. Fitzgerald*. See Pet. App. 14a n.3. It is precisely that rule limiting the universe of relevant cases that conflicts with holdings of other courts of appeals, and that petitioners challenge in this Court. Pet. i (Question 3); 14-18. The fact that the court of appeals viewed petitioners' contentions through the narrow lens of its own circuit rule cannot serve to insulate that rule from this Court's review.

[5] In *Elder*, the plaintiff's failure to call certain precedent to the district court's attention did not preclude him from relying on that precedent in the court of appeals. This Court reasoned that "[w]hether an asserted federal right was clearly established at a particular time, so that a public official who allegedly violated the right has no qualified immunity from suit, presents a question of law, not one of 'legal facts.'" 510 U.S. at 516.

Passenger Corp., 115 S. Ct. at 965.[6] Under *Lebron*, petitioners' Fourth Amendment claim, and their contention that the law supporting it was clearly established, are plainly preserved and appropriate for review by this Court, without regard to whether some of the arguments petitioners now present might be new.[7]

3. Respondents' argument (Br. in Opp. 7-12) that the Eleventh Circuit standard is consistent with *United States v. Lanier*, 117 S. Ct. 1219 (1997), misses the mark. Respondents contend, in essence, that *Lanier* and *Anderson v. Creighton*, 483 U.S. 635, 640 (1987), stand for the same "principles," and that the decision below is "commensurate with *Anderson*," and thus with *Lanier*. Br. in Opp. 10. Respondents are wrong, however, because both the decision below and *Lanier* address an issue not resolved in *Anderson*, and do so in conflicting ways.

Anderson held that, "in light of preexisting law, the unlawfulness [of the challenged conduct] must be apparent,"

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[6] In *Lebron*, this Court reviewed an argument that the petitioners in that case had expressly disavowed in the court of appeals. *See* 115 S. Ct. at 964. The Court applied its "traditional rule" that "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Lebron*, 115 S. Ct. at 965 (quoting *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992)).

[7] In any event, if any such waiver had occurred, it would relate only to the third question presented, and would not warrant denial of certiorari on the other two questions. As we stated in our petition (Pet. 11, 20-27), *T.L.O.* on its own sufficed to clearly establish petitioners' Fourth Amendment rights.

but that "the very action in question" need not have "previously been held unlawful." *Id.* at 640. *Anderson* did not reach the question whether, in order to defeat qualified immunity, a plaintiff must show that factually similar conduct had been held unlawful. The Eleventh Circuit held that the plaintiff must, requiring that there be established law developed in "a concrete and factually defined context" that is "materially similar" to the challenged conduct. See Pet. App. 5a; *Lassiter v. Alabama A & M Univ.*, 28 F.3d 1146, 1150 (11th Cir. 1994) (en banc). This Court in *Lanier*, in contrast, held that the law can be clearly established even in the absence of "precedents that applied the right at issue to a factual situation that is 'fundamentally similar'" to the claim at issue, and even where there are "notable factual distinctions between the precedents relied on and the cases then before the Court." 117 S. Ct. at 1227. Because the conduct challenged in this case falls at or near the prohibited end of the constitutional spectrum established by *T.L.O.*, its unlawfulness is "apparent" under *Lanier* even in the absence of any prior, factually similar case. The Eleventh Circuit's requirement of factually similar precedent, and its conclusion that *T.L.O.* is too dissimilar and its standard too general to have clearly established the law in this case, conflict with *Lanier*.

Respondents seek to reconcile the court of appeals' requirement of factually specific precedent with *Lanier*'s contrary holding by pointing to this Court's caveat in *Lanier* that, "when an earlier case expressly leaves open whether a general rule applies to the particular type of conduct at issue, a very high degree of prior factual particularity may be necessary." 117 S. Ct. at 1227. *See* Br. in Opp. 10-11 n.7 (citing *Mitchell v. Forsyth*, 472 U.S. 511, 530-535 (1985)). *T.L.O.* did not, however, "expressly leave open" the question whether strip searches by school personnel seeking small

amounts of money based on slim suspicion are constitutional. An issue is not "expressly" left open unless the Court states that it is declining to reach the issue.[8] If an issue were considered "expressly" left open under *Lanier*'s caveat simply because the Court had not explicitly addressed it, the caveat would swallow *Lanier*'s general rule that factually dissimilar precedent can clearly establish a constitutional right.

4. *Lanier* refutes respondents' argument (Br. in Opp. 19-22) that the generality of the *T.L.O.* standard, and the factual dissimilarities between *T.L.O.* and this case, "preclude[] a finding of clearly established law." *Id.* at *22*. The fact that the *T.L.O.* standard is flexible and thus "creates uncertainty in the extent of its resolve to prohibit" intrusions of students' privacy, 469 U.S. at 381 (Stevens, J., dissenting), does not mean that the application of the standard is uncertain in *every* case, as respondents suggest. Br. in Opp. 20. To be sure, there may be a relatively broad category of cases toward the middle of the constitutional spectrum to which the application of *T.L.O.* remains unclear. As we have argued (see Pet. 20-27), however, this is not such a case.

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[8] As an example, *Lanier* cites *Mitchell,* which was a constitutional challenge to a warrantless domestic national security wiretap. The cited passage in *Mitchell* points out that in *Katz v. United States*, 389 U.S. 347, 358 n.23 (1967), "the Court was careful to note that '[w]hether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security is a question not presented by this case.'" 472 U.S. at 532. That express statement in *Katz* contributed to the *Mitchell* Court's conclusion that former Attorney General Mitchell was entitled to qualified immunity. *See id.* at 535.

5. Finally, respondents' assertions about the factual record provide no grounds for denial of review. Referring to the Board of Education's and Office of Civil Rights' determinations, and to "inconsistencies" in the girls' testimony, respondents suggest that the strip searches never took place. Br. in Opp. 3.[9] The record plainly is adequate, however, to support the unanimous conclusion of the district court, the court of appeals panel and the *en banc* court that a reasonable jury could have found the facts in petitioners' favor. *See* Pet. App. 2a-4a, 40a-43a, 45a.[10]

CONCLUSION

The petition for a writ of certiorari should be granted.

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[9] OCR's own report acknowledged that there was "conflicting testimony whether the students were actually strip searched," and that OCR was unable to reach for interview "several" potential witnesses. *See* Pet'r C.A. App. 138-140.

[10] The *en banc* court recognized that, despite some discrepancies, petitioners' testimony was consistent "with respect to the assertion that they were asked to remove their clothing while inside the restroom." Pet. App. 3a. With regard to the putative basis for conducting the strip searches, respondents contend that "McKenzie had repeatedly asked and been given permission to go to the restroom after the regular restroom break." Br. in Opp. 2. Petitioners, however, dispute whether Herring or Sirmon knew of those requests when they made the girls strip, *see* Pet. App. 30a-31a & n.11, and McKenzie's restroom trips could not in any event provide any support for strip searching Jenkins.

Respectfully submitted.

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